THE
MODERN LAW REVIEW

Volume 14 October 1951 No. 4

Re POLEMIS

I HAVE felt a personal interest in this case for the last thirty years, since I argued it unsuccessfully before a Court of Appeal of great eminence which wisely rejected the contentions I advanced with the support of my then junior counsel (now Lord Porter). The gist of the decision was put in a nutshell by Mr. Justice Oliver Wendell Holmes in a letter to his friend Sir Frederick Pollock,[1] the former approving the decision, the latter contesting it. The words of the Justice were 'The tort once established, the tortfeasor takes the risk of consequences'.

There have been from time to time voices criticising or at least doubting the rule, and recently my friend Mr. Philip Landon has suggested that it might help teachers of law at the Universities if I were able to write an essay summarising the history of the doctrine before and after 1921 and the conflicting points of view. It is now sufficiently recognised that teachers of law have a great function in helping to explain and define the law and in influencing the ideas of the young entries. As a freelance in law, *jam rude donatus* I was willing to help. I had prepared this essay with Landon's help and criticism, though I take sole responsibility for its contents, when a decision was reported last March, entitled *Thurogood* v. *Van den Berghs & Jurgens Ltd.*,[2] in which the Court of Appeal, Cohen, Asquith and Birkett L.JJ., held unanimously that *Re Polemis* had not been overruled 'or its binding character, so far as this court is concerned, in any degree shaken'. Asquith L.J., delivering the judgment of the court on this point, added 'this is all that is necessary or proper to say here'. The case involved some important and difficult separate points as to liability on other issues on which the court reversed the decision of the Judge. Leave to appeal to the House of Lords was granted. When I read this decision, I felt some anxiety whether I should proceed with the publication of this essay since an authoritative ruling of the House of Lords would render observations of mine otiose. But on the whole I reflected that some time must in any case elapse before the House could give judgment and in any case the House might again find it unnecessary to decide the question, so I have thought it best to send my essay for publication for what it is worth.

1 *Holmes-Pollock Letters*, Vol. II, 88.
2 [1951] 1 T.L.R. 558.

Re Polemis [3] came before the court on an award in the form of a special case. The claimants were the owners of the Greek steamship *Thrasyboulos* and the respondents, Furness Withy & Co., were time charterers. While engaged on the service she was in Casablanca and it became necessary to shift a large number of tins of petrol in the hold. The stevedores, who were servants of the charterers, by their negligence allowed a heavy board to fall from the hatchway into the hold, which caused (so the arbitrators said) a spark, igniting petrol vapours in the hold and resulting in a fire which destroyed the vessel. So far the findings and conclusions seemed to offer no problem, but debate has centred round a further finding ' (f) That the causing of the spark could not reasonably have been anticipated from the falling of the board, though some damage to the ship might reasonably have been anticipated '. Reasonable anticipation does not mean anybody's anticipation in fact but is notional and a question for the court, but that may for the moment be disregarded. The arbitrators, experienced on these questions, held the charterers liable for the damages, £196,165 1s. 11d. They accepted the shipowners' contention that the ship was lost by the negligence of the charterers' stevedores and they rejected their contention that the damages were too remote as ' no reasonable man would have foreseen danger and/or damage of this kind resulting from the fall of the board '. It was this issue on the measure of damage which has largely engaged the attention of the court: the negligence on which the liability depended was not in dispute. I may note in passing that Professor Goodhart in his valuable essay on the *Palsgraf Case* [4] says that the finding is obviously incorrect for it ought reasonably to have been foreseen that the dropping of a plank might in the circumstances cause an explosion of petrol vapour, and he adds that garages have been destroyed by fire so caused. However it is clearly found that the ship was destroyed by the negligence of the charterers' servants: the tort being established, then, according to Mr. Justice Holmes' language, the charterers were liable for the consequence, which was the loss of the vessel.

I do not think it necessary to distinguish between contract and tort in this connection. In *The Liesbosch* [5] the House of Lords described *Re Polemis* as a case in tort of negligence though it might be regarded also in the alternative as based on breach of contractual duty under the charterparty. But the measure of damage would in this case be the same. ' The dominant rule of law ', it was said,[6] ' is the principle of restitutio in integrum, and subsidiary rules can only be justified if they give effect to that rule.' This no doubt must be qualified by applying where necessary the principle of remoteness of damages and similar rules. The charterparty contained here no stipulation relevant to the actual occurrence.

[3] [1921] 3 K.B. 560.
[4] *Essays in Jurisprudence*, 46.
[5] [1933] A.C. 449 at 461.
[6] *Loc. cit.* at 463.

Hence what has to be applied is the general rule stated by Lord Sumner, repeating the words of Bowen L.J., in *Cobb* v. *G. W. Ry. Co.*[7] ' The damage ', Lord Bowen said, ' must be such as would flow from the breach of duty in the ordinary and usual course of things. That is the general rule both in contract and in tort, except that in contract the law does not consider as too remote such damages as were in the contemplation of the parties at the time when the contract was made. Subject to that, only such damages can be recovered as were immediately and naturally caused by the breach.' To the same effect in *Hall* v. *Pim*, Lord Phillimore says [8] ' whether the action be one of tort or of contract, the defendant against whom judgment passes must pay all damages which naturally flow from his wrong action or his breach of contract. To these, in the case of breach of contract, the law superadds in appropriate cases those damages which, though they do not always or even usually flow from the breach of contract, are, at the time of making the contract, recognised by the parties as those which in the particular case may result from the breach '. This is often called the second rule in *Hadley* v. *Baxendale* [9] which, decided by the Court of Exchequer in 1851, has been accepted as authoritative on the points ever since. *Hadley's Case* refers to *both parties'* contemplation and I think refers to contemplation in fact.[10] That case dealt only with damages in contract. Before *Hadley's Case* the jury were directed simply not to give excessive or speculative damages. So far as I know, no distinction was made in practice in directions to the jury between contract and tort.[11]

I have referred at this stage to this point because it was earlier in some quarters charged erroneously against the ruling in *Re Polemis* that it had incorrectly confused in this matter contract and tort and had contradicted *Hadley* v. *Baxendale*. But the distinction would have been immaterial.

Before reciting the judgment of the Court of Appeal in *Re Polemis*, I wish to report a very valuable discussion by Lord Sumner on some important general principles relevant to this topic of damages in *Weld-Blundell* v. *Stephens* [12] which can be taken in a sense as an introduction to the judgments of the court in *Re Polemis* and to some extent the basis on which they rest. I have already quoted the passage which he recites from *Cobb's Case* (*supra*). Lord Sumner supplements his quotation by words of his own. ' This special application to contract of the rule as to remoteness depends, like other matters of contract, on mutuality and agreement, on some communication between the parties at or before

[7] 62 L.J.Q.B. 335 at 337. [8] 33 C.C. 324 at 336. [9] 9 Ex. 341.

[10] See *Monarch S.S. Co.* v. *A/B Karlshamns Oljefabriker* [1949] A.C. 196.

[11] In regard to the practice in contract before *Hadley* v. *Baxendale* much light was thrown by valuable articles in the *Law Quarterly Review* by George T. Washington ((1931) 47 L.Q.R. 345 and (1932) 48 L.Q.R. 90) The author was then a Rhodes Scholar at Oriel College, Oxford, and is now a Justice in the Federal Circuit Court of Appeals, Washington, D.C.

[12] [1920] A.C. 956 at 977 *et seq.*

the time when the contract was made, or some knowledge and acceptance by the one party of the intention of the other in entering into the contract.' The cause of action in *Weld-Blundell* was a failure to keep safely by exercise of due care a letter containing serious libels by Weld-Blundell which led to the party defamed bringing an action against Weld-Blundell. The want of due care or breach of contract was admitted. Lord Sumner puts aside any question that any such thing was in the contemplation of either party; ' certainly it was not in that of both '. There was therefore ' no ground for applying to the defendant's breach of contract in this case any other measure of damages than such as would have applied if it had been a breach of a non-contractual duty '. So that however different the subject matter might be, it was correct for the Court of Appeal in *Re Polemis* to quote the general rules stated by Lord Sumner. When Lord Sumner turns to causation, he decides that the best word to use is ' direct ' consequences, rejecting such words as ' natural ', ' necessary ', ' probable ', ' effective ', ' proximate ', which are often confusedly used. He concludes: ' " Direct " cause excludes what is indirect, conveys the essential distinction which *causa causans* and *causa sine qua non* rather cumbrously indicate, and is consistent with the possibility of the concurrence of more direct causes than one, operating at the same time and leading to a common result . . .'. A little lower down on p. 984 he propounds the essential principle. ' What a defendant ought to have anticipated as a reasonable man is material if the question is whether or not he was guilty of negligence, that is of want of due care according to the circumstances. This, however, goes to culpability not to compensation: *Blyth* v. *Birmingham Waterworks*; *Smith* v. *London & South Western Ry. Co.*, *per* Blackburn J. Again, what ordinarily happens, or may reasonably be expected to happen, is material where a mere series of physical phenomena has to be investigated and the remoteness of the damage or the reverse is to be decided accordingly. Such a case is *Sharp* v. *Powell*, unless indeed it be regarded as a decision on negligence or no negligence.' Then Lord Sumner goes on to consider the various ways in which the action of human beings may intervene: he mentions a special line of cases relating to dangerous things (in which petrol vapour may find a place). However, it is clear that in *Re Polemis* what happened was instantaneous, coming immediately upon the negligent act. There was no *novus actus interveniens*. The explosion and fire were a direct sequence of cause and effect. I should not regard the hypothetical spark as a separate item in the explosion and fire. It was not a distinct cause capable of ranking as a ' legal ' cause. It is clear that the arbitrators did not regard the ' spark ' as interrupting the sequence of cause and effect between the dropping of the board and the fire or as preventing the fire from being directly caused by the negligent act of dropping the plank.

In the Court of Appeal the leading judgment was delivered by Bankes L.J. He quoted from Lord Sumner's judgment in *Weld-Blundell* v. *Stephens* (*supra*) various passages which I have just extracted. He summed up the position: 'In the present case the arbitrators have found as a fact that the falling of the plank was due to the negligence of the defendants' servants. The fire appears to me to have been directly caused by the falling of the plank. Under these circumstances I consider that it is immaterial that the causing of the spark by the falling of the plank could not have been reasonably anticipated. . . . Given the breach of duty which constitutes the negligence, and given the damage as a direct result of that negligence, the anticipations of the person whose negligent act has produced the damage appear to me to be irrelevant'. Bankes L.J. means at the stage of measuring damages. Warrington L.J. after quoting *Smith* v. *London & South Western Ry. Co.*, particularly the judgments in the Exchequer Chamber of Channell B. and Blackburn J., tersely sums up his conclusion as follows: 'In the present case it is clear that the act causing the plank to fall was in law a negligent act, because some damage to the ship might reasonably be anticipated. If this is so then the appellants are liable for the actual loss, that being on the findings of the arbitrators the direct result of the falling board: see *per* Lord Sumner in *Weld-Blundell* v. *Stephens*'. Scrutton L.J., after some interesting observations on the question of causation, proceeds: 'In this case, however, the problem is simpler. To determine whether an act is negligent, it is relevant to determine whether any reasonable man would foresee that the act would cause damage; if he could not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage it actually causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act, except that they could not avoid its results. Once the act is negligent, the fact that its exact operation was not foreseen is immaterial. This is the distinction laid down by the majority of the Exchequer in *Smith* v. *London & South Western Ry. Co.* and by the majority of the court *in banc* in *Rigby* v. *Hewitt* and *Greenland* v. *Chaplin*, and approved recently by Lord Sumner in *Weld-Blundell* v. *Stephens* and Sir Samuel Evans in *H.M.S. London*. In the present case it was negligent in discharging cargo to knock down planks of the temporary staging, for they might easily cause some damage either to workmen, or cargo, or the ship. The fact that they did directly produce an unexpected result, a spark in an atmosphere of petrol vapour which caused a fire, does not relieve the person who was negligent from the damage which his negligent act directly caused'.

I hope a little later to explain the implications of these statements; let me however add what Lord Atkin once said, that *Re*

Polemis involved no new law. For the moment, I may observe that a case of negligence must involve two separate issues, as Lord Sumner pointed out—liability or responsibility and compensation. A plaintiff may fail on liability because he has failed to establish (1) duty to him, (2) breach of that duty, (3) damage to him directly caused by breach of that duty. Proof of the duty on which responsibility depends may be established in different ways. The duty must be specifically due to the plaintiff and to some particular interest of his, *e.g.*, his personal security in some aspect, or in regard to some property. The source of the duty may be found in contract, or in some statutory duty for his protection or (the most general head) because the act complained of involved potentialities of damage to him, such as were or should have been reasonably apparent to the doer. In the absence of specific duty (*e.g.*, by contract or statute) the duty must depend on reasonable foreseeability of the potentiality of danger to the other person. Negligence obviously must depend on awareness, actual or imputed, of the circumstances. But if the duty is broken and damage follows, the cause of action is made out and the doer is liable for the ' direct ' damage resulting in fact from the negligent act. ' Direct ' is the word used by Vaughan C.J. in the classical case of *Scott* v. *Shepherd*.[13] The man who threw the squibs directly caused to the plaintiff the loss of his eye; so the court held; directness was not excluded simply because the final direction of the squib had been determined by other intermediate agents' hands, who only in turn passed it away from themselves—thus the conduct of the defendant was a direct and not a remote cause or something extraneous or extrinsic. This principle will be found in the most diverse applications, because, as in the case of negligence itself, remoteness is determined in accordance with the circumstances, though the question is one for the court to decide.

As it has happened and perhaps not unnaturally, the cases since *Re Polemis* have generally dealt with the issue of duty, which involves imperative law. The resulting damage, if not too remote but directly traceable to the negligent act, is matter of fact and depends on the circumstances and on the happenings subsequent to the negligent act. It has been said that the former depends on ' foresight ' and the latter on ' hindsight '. Remoteness of damage is of course a question for the judge but he must decide it on what are the facts and on what has actually happened. It is all a matter subsequent to breach of duty. Questions of compensation are of course subsequent to questions of culpability or of liability. The problems of compensation can only be investigated by ascertaining what in fact resulted from the negligent act, and in doing so direct consequence can be distinguished from consequences which are too remote. On the issue of remoteness, questions of how the reasonable observer should regard the situation may also arise.

[13] (1773) 2 W.Bl. 892.

But there the test is different from that which applies in determining what the actor should have reasonably foreseen as the potentialities of his act which is thus held to be negligent and blameworthy. Thus in *Summer* v. *Salford Corporation*, where the immediate question was whether the damage was too remote, I said,[14] if I may quote my own words: ' She [the plaintiff] was doing what any intelligent observer, knowing exactly how she was circumstanced, would have expected her to do. Her injury was thus the direct and natural consequence of the respondent's [defendant's] default '. This may sufficiently indicate the difference between on the one hand foreseeability of damage, which is notionally anterior to the act which is negligent because of the foreseeability, and on the other hand the subsequent ex post facto judgment in regard to remoteness after the damage has been done and ascertained, and the question is then only how far it is directly traceable to the defendant's default. I added that the plaintiff's damage may still be directly due to the defendant's default and recoverable ' even though the accident and damage would not have happened but for some action of the plaintiff ', so long as that action was ' the direct and natural consequence of the defendant's default notwithstanding the co-operation of human conduct, whether of the plaintiff or of a third party '. The word ' natural ' seems otiose though in frequent use in these questions. I have mentioned this aspect here in order to emphasise the difference between foresight and hindsight in this context, between liability and compensation in connection within the ruling in *Re Polemis*, and between speculative prevision and actual happening. On the first issue the Court of Appeal adopted the test of the imputed foresight of the reasonable man (that is notional, it is not anybody's actual ideas), and by anticipation applied what was later laid down by the House of Lords in *Donoghue* v. *Stevenson* [15] and actually, in 1942, applied in *Bourhill* v. *Young* [16] as the criterion of liability for purposes of determining cases of negligence under the rule in *Re Polemis*. But as the House of Lords in that case held that no breach of duty was made out, the House found it unnecessary to discuss the question of measure of damages and expressed no opinion on that question. A failure to observe the distinction between the cause of action and the measure of damages has led to confusion in the attacks of some lawyers who have criticised in general terms the authority of *Re Polemis*. As I observed at the outset of this essay the House of Lords have still to determine that latter question expressly but what I may call the first limb of the rule in *Re Polemis* is firmly established by the general principle affirmed in *Donoghue* v. *Stevenson* and by its special applications in *Bourhill* v. *Young* and other similar cases in the House of Lords, in all of which the criterion of negligent conduct is reasonable foreseeability of harm to the other person. That may

[14] [1943] A.C. 283 at 297, 296.
[15] [1932] A.C. 562.
[16] [1943] A.C. 92.

seem a very vague and indefinite basis but it establishes a sufficient principle of definition to be applied in judging the facts. Negligence is failure to use due care in regard to the other party's particular interest. Due care necessarily involves either awareness of the potentiality of danger to him if the act is done or, more precisely, not necessarily awareness in fact but a duty to be aware—reasonable or imputed awareness. I think *Bourhill* may go and goes further than mere notional awareness of potentiality of danger to the particular person and extends in some cases to awareness of that person's particular susceptibility to the particular harm. Just as awareness means the imputation of reasonable awareness of danger affecting the plaintiff on the assumption that he is normal, that is, in the absence of awareness of any particular susceptibility, the more specific degree of awareness may impose a higher and more specific standard of care corresponding to the awareness. Thus negligence is always relative not merely to the particular individual affected but to his particular susceptibility if foresight of that is reasonably attributed in law to the particular actor. Thus, if I may again quote from *Bourhill* v. *Young*, I said [17]: ' This general concept of reasonable foresight as the criterion of negligence or breach of duty . . . may be criticised as too vague, but negligence is a fluid principle which has to be applied to the most diverse conditions and problems of human life. It is a concrete, not an abstract, idea. Willes J. defined it as absence of care according to the circumstances: *Vaughan* v. *Taff Vale Ry. Co.*[18] It is also always relative to the individual affected. This raises a serious additional difficulty in the cases where it has to be determined, not merely whether the act itself is negligent against someone, but whether it is negligent vis-à-vis the plaintiff. This is the crucial point in cases of nervous shock '. Thus the same act may be proximately negligent towards two different people according to the diverse interests of each person which are affected. As Lord Macmillan said in *Donoghue* v. *Stevenson* [19]: ' The law takes no cognisance of carelessness in the abstract. It concerns itself with carelessness only where there is duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. . . . The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. . . . Where there is room for diversity of view, it is in determining what circumstances will establish such a relationship between the parties as to give rise, on the one side, to a duty to take care, and on the other side, to a right to have care taken '. I might be tempted to substitute the words ' instances ' for the word ' categories '. This is the modern rule

[17] At 107.
[18] (1860) 5 H. & N. 679, 688.
[19] [1932] A.C. 562 at 618–9.

which is in sharp contrast to the old law of limited, fixed and rigid categories of wrongful acts, which is now abolished by the Judicature Acts. It certainly throws sometimes a difficult task on the judge. But the judicial function must or may involve an act of the judicial will in each case if justice is to be done ' according to the circumstances '. The rule after almost a century's experience has worked well. The crucial test is to define in each case what, if any, is the duty, as the decisions show, and apply the general criterion to each case. A particular difficulty has been sometimes to distinguish cases of remoteness of damage from cases of absence of duty, in which latter case the test is generally as I have explained reasonable awareness or foreseeability on the part of the actor on which the normative decision of legal duty ' according to the circumstances ' depends. The resulting damage is primarily a matter of fact. I may here note without developing or discussing or criticising the particular rules which by way of contrast have been applied in the case of negligent misstatements. I think Lord Atkin must have intended to recognise the distinction when in *Donoghue* v. *Stevenson*, at pp. 581 and 582, *Le Lievre* v. *Gould* [20] was cited in his judgment. Furthermore he could not have intended to lay down a different rule from that stated in *Nocton* v. *Ashburton* [21] as defining the extent of duty in regard to negligent misstatements. Negligence in words is distinguished there from negligence in acts. The former, it is there said, involves no breach of duty in the absence of fraud, contract or fiduciary relationship. Recently in the Court of Appeal in *Candler* v. *Crane, Christmas & Co.*[22] Asquith L.J., as he then was, and Cohen L.J. have held (Denning L.J. dissenting) that *Le Lievre* v. *Gould* is not qualified by *Donoghue's Case* and so at the moment the law is fixed. Asquith L.J. observes that *Donoghue's Case* has never been applied to injury other than physical, by which I apprehend he means to include also material injury. Without being dogmatic this seems to be generally true on the authorities. Perhaps it is more accurate to say that *Donoghue's Case* has never so far been applied to negligence in words. There may well be a substantial practical reason of a general character for that, as is suggested by Cohen L.J. in a long quotation from the language of Cardozo C.J. in *Ultramares Corporation* v. *Touche*.[23] I think that in English law the general duty for purposes of the law of tort should as the law stands be limited so as not to include mere negligence in words and the first part of the rule in *Re Polemis* should be limited accordingly or at least only applied if it is applied with a difference.[24] The courts still have to define and elucidate the law on this point. The legislature has already intervened in regard to this question and may some day review the whole position, which involves questions both of logic and of social values.

[20] [1893] 1 Q.B. 34. [21] [1914] A.C. 982. [22] [1951] 2 K.B. 164.
[23] (1931) 255 N.Y.Rep. 170. [24] See article, 67 L.Q.R. 212.

Before I turn more specifically to the second limb of the decision in *Re Polemis* I should like to quote the case of *Smith* v. *London & South Western Ry. Co.*,[25] a decision closely followed by the Court of Appeal in *Re Polemis*; that decision discussed not only the issue of duty but that of damages. The plaintiff's cottage had been destroyed by fire, which had originated from trimmings negligently left by the defendants' servants on the side of the railway line: they had caught fire from the sparks emitted from a passing engine; the fire spread to the plaintiff's cottage about 200 yards away; the defendants denied that they owed any duty to the plaintiff because his cottage was outside the range of foreseeable danger from the railway line and the combustible trimmings. That argument was rejected on the facts, in particular it was observed that the summer was hot and dry, the intervening hedge and stubble were very inflammable and there was a wind blowing towards the cottage. The court held that the negligent act of leaving the trimmings where they were was the direct cause of the fire and that the damage was foreseeable and recoverable. I do not want to repeat anything which I have already quoted from the judgments of the Court of Appeal, but I think that Lord Blackburn's judgment calls for a fuller citation. 'Then comes the question', he said,[26] 'is there evidence enough in this case of a want of that reasonable care? It can hardly be negligent not to provide against that which no one would anticipate.' He goes on to refer to the facts of the case, and proceeds: 'If the negligence were once established, it would be no answer that it did much more damage than was expected. If a man fires a gun across a road, where he may reasonably anticipate that persons will be passing, and hits someone, he is guilty of negligence and liable for the injury he has caused; but if he fires in his own wood, where he cannot reasonably anticipate that anyone will be, he is not liable to any one whom he shoots, which shows that what a person may reasonably anticipate is important in considering whether he has been negligent; but if a man fires across a road where it is dangerous to do so and kills a man who is in the receipt of a large income, he will be liable for the whole damage, however great, which may have resulted to his family, and cannot set up that he could not have reasonably expected to injure any one but a labourer'. This passage well emphasises the distinction between negligence and damages. It anticipates in 1871, and explains, the decision of the court in *Re Polemis*. To the same effect was *Sharp* v. *Powell*[27] in 1872 in which the court followed and applied *Smith* v. *London & South Western Ry. Co.* In doing so they dismissed the plaintiff's claim on the ground that no negligence was shown. The plaintiff's horse slipped on a patch of ice and was injured. The defendant's servant had in breach of a Police Act

[25] L.R. 5 C.P. 98; L.R. 6 C.P. 14 (Exchequer Chamber).
[26] L.R. 6 C.P. at 22.
[27] L.R. 7 C.P. 253.

washed a van. He did not know and had no reason to know that the water had accumulated and frozen, but the breach of the Police Act was not the gist of the decision. Lord Sumner in the passage I have quoted above regards the case as a case of ' negligence or no negligence '. That I think is the better view and is preferable to the other indicated by Lord Sumner which I think suggests that the extraordinary frost was a separate and independent cause, something like an act of God, or at least what the groom could not have expected. This decision has for some reason been said to be inconsistent with the rule laid down in *Re Polemis*. It is on the contrary an illustration of the rule. The defendant owed no duty because he was not chargeable with either actual or imputed knowledge of the danger. In the course of the interesting argument for the defendant by H. James (afterwards Lord James of Hereford) reference was made to what was said by Pollock C.B. in *Greenland* v. *Chaplin* [28] that he entertained ' considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated '. He added that his brethren did not agree with his doubt. The day before in the same court in *Rigby* v. *Hewitt* [29] the Chief Baron expressed the same tentative misgiving. But he added: ' The rest of the court are entirely of opinion, that, generally speaking, where an injury arises from the misconduct of another, the party who is injured has a right to recover from the injuring party for all the consequences of that injury '. His brethren in that case were Parke, Alderson, Rolfe and Platt BB. and in the earlier case of the two they were Rolfe and Platt BB. It is clear therefore these eminent common lawyers would not share in the Chief Baron's misgivings but regarded the common law as to the measure of damages in negligence as being what it was held to be in *Re Polemis* about seventy years later. In *The Racine* [30] in 1906 Vaughan Williams L.J. seems to have had doubts similar to those of the Chief Baron. *The Racine* was an Admiralty case and the question related to loss of profits consequent on a collision; it was held on the principle of *The Argentino* [31] that the injured shipowner was entitled by way of damages to *restitutio in integrum*. Vaughan Williams L.J. all the same felt a difficulty in that case about a rule which made the measure of damages, where the wrongful act is absolutely the same in both cases, differ absolutely according to the loss which has been sustained by the person who is injured by the collision though the wrongful act of the wrongdoer is identical in both cases. But I venture to observe that in the same way in an ordinary road

[28] 5 Ex. 243 at 248.
[29] 5 Ex. 240.
[30] [1906] P. 273.
[31] 14 App.Cas. 519.

accident on land, the negligent defendant may have to pay damages to both the injured plaintiff and his chauffeur, both being injured in the same accident. In principle, however, as the law stands that result would follow. The law does not here aim at punishing the wrongdoer: it is not penal: its aim is to compensate the sufferer, to effect what is called *restitutio in integrum* in the authorities I have cited. *Restitutio* does not there mean the same as the term Restitution which is often now used (as in the American Restatement) to connote what is also alternatively called quasi-contract. That is, of course, a different concept from damages or compensation, which latter means compensating for the detriment which the plaintiff has suffered upon the breach of contract or other wrong. This can be done by calculating how much better off he would have been if the wrong had not been committed; in Restitution or quasi-contract the idea is merely restoration, the replacement of the actual object or value taken away and retained from the plaintiff by the defendant, not compensation for what the plaintiff would have had if the wrong had not been committed. This generally would be something quite different from the *quid pro quo* on the other side. Damages therefore may be entirely disproportionate to the consideration or value derived by the wrongdoer. It is this disproportion which to some extent may account for a reluctance to exact compensation to the full amount which the plaintiff has failed to acquire or lost. But it seems that this reluctance is regarded by the law as wrong and unfair. According to the theory of the common law the plaintiff is entitled to what he would have got or possessed as of right if the contract had been performed or the wrong had not been committed. Someone has to bear the loss. The law says that the wrongdoer, not the injured party, should bear it. The damages thus required by way of compensation may be great. As only one possible illustration I may quote *Waterlow* v. *Bank of Portugal.*[32] That was a case of breach of contract. The defendants were a firm of printers of bank notes of international repute. The plaintiff, a Portuguese bank, employed them to print the notes which they had power to issue as currency. By an extremely ingenious fraud, a third party induced the unsuspicious and innocent defendants to print and deliver to him a batch of 580,000 notes exactly similar except for a microscopic mark to an existing issue they had printed under their contract with the bank. The defendant and his associates proceeded to put the false notes into circulation as if good notes. When the fraud was discovered no one in Portugal could be sure if the notes of the particular denomination were genuine or false. To save the credit of the national currency the bank called in all the notes of that issue, genuine or false (by that time the minute difference had been detected and the distinction made possible), and gave in exchange other notes of another issue of

[32] [1932] A.C. 452.

the same face value on which the bank of course was liable. All courts in England held that the breach of contract in printing and issuing notes without the bank's actual authority was the legal cause of the damage. No one could in advance have dreamt of such a strange series of events, but granted the actual circumstances no one could say that the damage was not the direct or the natural (*i.e.*, ' ordinary ') consequence of such circumstances within the first rule in *Hadley* v. *Baxendale*. There was no practical basis for apportioning the loss between Waterlow and the bank. The former had to pay the whole loss less salvage. The duty resulted from the contract which was matter of law; the damages depended on the facts which resulted directly from the breach.

Re Polemis has so far as I know always been concerned with breaches of contract or actual physical or material wrongs and damage. If the bank case had not been one of contract, it might have been, perhaps, impossible to bring home negligence against the bank. But as Lord Sumner pointed out in *Weld-Blundell's Case*, the measure of damage is the same, with one obvious exception peculiar to contract, *i.e.*, mutual contemplation or communication, in non-contractual as in contractual causes of action, once culpability or responsibility has been established. I am here disregarding questions which arise in case of negligent misrepresentation to which I have already referred.

But on the issue of measure of damages the judgment in *Re Polemis* has survived the misgivings to which I have already adverted. There have however been recently some expressions of doubt, not proceeding to direct dissent, and also some criticism, and it has been questioned by some learned authors. In a learned work by Dr. Glanville Williams on *Joint Torts and Contributory Negligence* (at p. 368) the author refers to the ruling of *Re Polemis* ' according to which if conduct is negligent in one respect the defendant becomes liable for damage of quite a different kind resulting from the conduct, which he had no reason to foresee. All that can be said is that some limitation must be put upon the rule in *Re Polemis*. It is easy enough to say that the rule must be restricted to immediate physical consequences of the act though what is meant by " immediate " and what by " physical " is a hard question to answer '. I have indicated my faith in the capacity of our judges to answer these questions and leave it there. I must however question, for reasons sufficiently obvious to readers of this article, the accuracy of his summation of the effect of the judgment. The author in a footnote also adds that ' the decision in *Woods* v. *Duncan* [1946] A.C. 401 on the liability of the builders and subcontractors can be reconciled with *Re Polemis* only by saying that the damage was not immediate '. I venture to think that that tragic case of the submarine *Thetis*, raising questions of fact ' both obscure and difficult ' in Lord Simonds' words, has nothing to say

against the ruling principles of *Re Polemis*. The *Thetis*, a new submarine, when engaged on diving tests, sank because by a terrible calamity, the bow cap at the sea end of the particular torpedo tube was opened at the same time as the rear door of the tube was opened and the vessel was subject to the free incursion of water. The submarine sank in consequence to the bottom with the 100 men on board. The House of Lords, reversing the judgment of the Court of Appeal, held that it was impossible to find who was responsible or to say exactly how the terrible disaster came about, or what (if any) breach of duty was committed or by whom. The builders and contractors were indeed negligent, it was held, in regard to the blocking with paint of a test-cock which, if in order and used, might have led to detection that water was coming in. But Lord Porter anticipated any question about *Re Polemis* by what he said on p. 437. ' Both companies [*i.e.*, builders and sub-contractors] then in my view were negligent in respect of this careless painting of the rear door and their failure to detect the blocking of the orifice of the test-cock by a proper inspection. But negligence in failing properly to paint a ship is not necessarily negligence towards all or any of those on board her. The two companies no doubt owed a duty to all the ship's company, both naval ratings and civilians, but would only be guilty of want of care towards them if the act or omission complained of would reasonably be anticipated as likely to cause them harm. No question of measure of damage arises here, as arose in *Re Polemis and Furness Withy & Co. Ltd.* Your Lordships are concerned with the earlier question whether these defendants were negligent towards the two men whose widows are making a claim—a question similar in character to that discussed in *Hay* (or *Bourhill*) v. *Young*. Ought then Cammell Laird [the builders] or the Bitumastic Company [the painters] to have anticipated that the blocking of the test-cock would be an element of danger to any one on board the ship or to those two men in particular? I think not. . . . There is nothing to show that they knew or had reason to know of the purpose for which the test-cock was required. It created no anticipation in itself.' On the same issue about the blocking of the test-cock, Lord Simon said (p. 421): ' After much reflection I have reached the conclusion that the Court of Appeal is right in saying that the blocking of the hole with paint is not the cause of the accident . . .'. His Lordship has just approved ' the common-sense tests [as to " cause "] indicated by this House in *Yorkshire Dale Steamship Co. Ltd.* v. *Minister of War Transport* '.[34] He went on to say ' It is not, in my opinion, conclusive to say merely that the blocking of the hole is not the cause because nothing would have happened if Lieutenant Woods had not opened the door '. The unanimous judgments in the House of Lords were merely the culmination of long enquiries in the courts below and in the official

[34] [1942] A.C. 691.

enquiries. *Sit finis litium*. To close the tragic story, I may note that Lieutenant Woods was killed in a motor accident in Ceylon on the day the House delivered their judgment.

I venture the reflection that the law is not developed by imperfect or perhaps slightly misleading references to a single case. In fact all courts which discussed the *Thetis Case* proceed on the basis of recognising the authority and correctness of the ruling in *Re Polemis* and treat it as binding. I may add a recent statement of the ruling from Lord du Parcq's judgment in *Aldham* v. *United Dairies (London) Ltd.*[35]: 'It may now be regarded as elementary law that in an action for negligence the plaintiff must prove, first, that the defendant as a reasonable man ought to have foreseen that the act or omission complained of might cause damage, [*sc.* to the plaintiff] and secondly, that the negligent act or omission directly caused the damage suffered by the plaintiff. If negligence is proved the defendant is liable for damage caused by his negligence, even though he could not have been expected to foresee the exact kind or the "type" of damage which was caused in fact . . .'. Lord du Parcq (then L.J.) was one of the Court of Appeal which sat on the *Thetis Case* in the Court of Appeal. I may perhaps add Lord Atkin's voice to the general approval by a short passage from *Hambro Bros.* v. *Stokes*, when he was a Lord Justice. He said "'No doubt the particular injury was not contemplated by the defendant, but it is plain from *Re Polemis and Furness Withy & Co.* that this is immaterial. If the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial so long as the damage is in fact directly traceable to the negligent act and not due to the operation of independent causes having no connection with the negligent act . . .'. Lord Atkin, it is clear, means to the plaintiff. Thus all these eminent judges repeat the same views as those I have quoted on the measure of damages from the expressions of the great common lawyers in 1850 and later.

I may add only one word about *Aldham's Case* because the Court of Appeal there quoted and distinguished the earlier case of *Cox* v. *Burbidge*[37] which has sometimes been quoted as inconsistent with *Re Polemis*. In each of these cases the negligence charged was in leaving a horse uncontrolled. In the older case (*Cox* v. *Burbidge*) the defendant was absolved from blame because the horse there being an animal *mansuetae naturae* had given no evidence of vicious tendencies, whereas in the latter case it had. There was no negligence in the earlier case, because there was no scienter, whereas in *Aldham's Case* there was. What was at issue was the presence or absence of the particular duty of care flowing from the reasonable foreseeability or the reverse of the potentiality of

[35] [1940] 1 K.B. 507 at 513.
[36] [1925] 1 K.B. 141 at 157.
[37] 13 C.B. (N.S.) 430.

damage. I have only mentioned these cases because *Aldham's Case* has been added by Denning L.J. to those which, like Dr. Glanville Williams, he has cited as leading him to wonder if *Re Polemis* can survive them. I do not repeat why, with all deference to the learned Lord Justice, I regard them as not affecting the survival of *Re Polemis*.

If the rule as to the measure of damages depends on their foreseeability, that is, if the plaintiff can only recover in respect of a wrong such damages as the wrongdoer could be proved or deemed to have foreseen when he committed the tort, it is clear that a great upheaval of recognised authority would be necessary, indeed a breach of authority with tradition and precedents for which statutory enactments would be necessary.

Holdsworth in his famous History [38] has some interesting observations on this issue of the measure of damages in negligence. He regards *Re Polemis* as in accordance with the preponderance of recent judicial opinion. But I feel some difficulty in his view that this conclusion is perhaps open to question. He seems to distinguish the measure of damages in negligence from the measure of damages in other wrongful acts, because, as he says, ' If we are basing liability on a negligent act, and if negligence consists in a failure to foresee results which ought reasonably to have been foreseen, it would seem that the negligent person ought only to be made liable to the extent to which he ought to have foreseen these results '. It seems to me that Lord Blackburn and Lord Sumner have both by anticipation answered that argument, which I think more plausible than sound, and in truth contrary to the whole course of the common law in dealing with compensation. It ignores the difference between responsibility and compensation. I cannot repeat what I have already written or the passages from the two great judges which I have already cited on this point, or again contrast the legal issue of a right to be compensated with the compensation for the actual damage. Holdsworth refers to *Hadley's Case*, but as Lord Sumner has pointed out the contemplation of *both* parties is there essential, it is their common consensual appraisement of the extent of responsibility which the party was assuming if he made default. There can be no parallel between such a case and a case of negligence which is unilateral and inadvertent. The injured party's damage is experienced in fact, the reasonable anticipation of damage is anterior to the event, it is merely notional or imputed by law as evidencing the duty, breach of which is the wrong and cannot be deemed to exhaust even notionally the full or exact effect of the negligent act. But I need not attempt to repeat what I have written. I can conclude by repeating that *Hadley's Case* only refers to contemplation as an element affecting damages in the sense of the contemplation of both parties. ' Contemplation ' of one party is as irrelevant in regard to

[38] Vol. VIII, 462 *et seq.*

damages in the case of negligence as in the case of any other wrong, including breach of contract.

Holdsworth however goes on to say that on ' historical grounds ' (on which no one could speak with greater authority than Holdsworth) *Re Polemis* ' shows the continuous bias of the courts in favour of making a defendant liable for all the consequences of a wrongful act flowing directly therefrom, without reference to his mental state '. He further says that the rule ' is historically interesting because it shows the continued adherence to the very primitive principle laid down by Bacon and Hale, that in adjudicating upon questions of civil liability, the law looks not at the extent of the demerits of the wrongdoer, but at the damage of the party injured '. A third ground which he adduces in support of the rule in *Re Polemis* is that it makes it very much easier to estimate the measure of damages because ' it makes it unnecessary to separate the items of damage fairly attributable to the defendant's negligence, from those not fairly attributable '.

I should venture to criticise the last explanation for several reasons, in particular because of the analogy which he seems to draw between damages in negligence and contributory negligence. In contributory negligence there is a very substantial ground for distinguishing the damage due to the latter: the conduct of two persons, plaintiff and defendant, is in question and no difficulty in practice is experienced in reducing the plaintiff's claim to the extent that the damage results from his own fault in part. This is now done under the Contributory Negligence Act of 1945, as it has been done for generations in the Admiralty Court. But in negligence due solely to the act of the defendant, there is no such ground of distinction: the whole damage (*i.e.*, directly resulting from the wrong) is attributable to the defendant. There can be no division except what is wholly arbitrary, like the apportionment under Limitation of Liability laws. It is not a question of what is easy or difficult, but what is practically possible. There is no logical test of division. The *Polemis* rule as stated by Scrutton L.J. and others requires that the damages recoverable should be measured by the direct consequences, which excludes remote or extraneous causes. It may further be noted (perhaps it is too obvious to mention) that the rule as applied in *Bourhill's Case* and elsewhere fixes attention on the particular duty to the plaintiff and limits recovery to results of breach of that duty. It is misleading to speak as if damages not so limited could be included. The interest of the defendant must be safeguarded so as to avoid saddling him unfairly with any more than the plaintiff's loss directly due to that breach of his duty, but in so far as that breach has resulted in damage to the plaintiff, it would be unfair to leave the plaintiff to bear the damage so resulting and due solely to the defendant's fault. Someone has to bear the loss, though with the help of insurance the ultimate burden will fall in the great majority of cases on the insurer,

who recoups himself by the premiums he receives. In some cases of frequent occurrence, such as motoring accidents, Parliament has intervened to compel motorists to carry insurance, and thus both the risk of the delinquent being ruined by having to pay the damages and the risk of the sufferer not being paid his loss which might have exceeded the delinquent's financial capacity are eliminated.

I have I think met the objection that if foreseeability is a sufficient test to fix responsibility for his act, it should also be a test for the measure of damages. There is no real analogy.

There have been such changes in the application of principles of the common law and in the principles themselves that I do not seek to forecast the future. I have been occupied in attempting to explain what is the effect of *Re Polemis*. I am not sure it has been everywhere understood.

WRIGHT.*

* Lord Wright of Durley, P.C., G.C.M.G., F.B.A., LL.D., was one of the judges of the King's Bench Division, 1925–32; a Lord of Appeal in Ordinary, 1932–5, 1937–47; Master of the Rolls, 1935–7; Chairman of the United Nations War Crimes Commission, 1945; author of *Legal Essays and Addresses* and many articles.

STANDARDS OF PROOF IN THE DIVORCE COURT*

'A CORRECT mode of expressing degrees of persuasion and probative force', said Bentham,[1] is 'an object of no inconsiderable importance; and the further we go into the subject the clearer will be the light in which the importance of it will present itself.' His solution of the problem, which was that of a numerical scale wherewith to evaluate these degrees, he tendered as the only adequate method of assessment owing to 'the incapacity of ordinary language for expressing degrees of persuasion and probative force'. Such incapacity [2] of language, it may be surmised, is likely to be at the root of the difficulties which may arise from the Court of Appeal's recent decisions upon the standard of proof of matrimonial offences, which bid fair to upset a terminological distinction which has grown up over the last century and a half between proof in civil and criminal cases. The question of the application of the criminal courts' standards to cases in the Divorce Court has 'caused a certain amount of discussion, and, no doubt, the question may require to be finally settled hereafter',[3] but, although the Court of Appeal has, since the occasion of that dictum, taken at least two opportunities of pronouncing on the matter [4] and the House of Lords has had before it [5] a case in which 'a question was raised as to the standard of proof', it may be doubted whether finality has been reached. Indeed, it may well be that the last word will remain with Locke [6] who told us that in the twilight of probability 'it is impossible to reduce to precise rules, the various degrees wherein men give their assent' [7]; but it is

* Based upon a lecture delivered to inaugurate the Chair of Jurisprudence in the University of Bristol.

1 *Rationale of Evidence*, Bk. I, c. 6.

2 Or, rather, inconsistency: see n. 66, *infra*.

3 *Per* Bucknill L.J. in *Davis* v. *Davis* [1950] 1 All E.R. 40.

4 In *Gower* v. *Gower* [1950] 1 All E.R. 804 and *Bater* v. *Bater* [1950] 2 All E.R. 458. More recently, Bucknill L.J. ([1950] P., at p. 188) has cited with approval the dictum of Lord Birkenhead L.C. in *C.* (*otherwise H.*) v. *C.* [1921] P. 339, 403, to the effect that 'the petitioner must remove all reasonable doubt' where she undertakes the burden of proof of 'a grave and wounding imputation' of physical incapacity.

5 *Preston-Jones* v. *Preston-Jones* [1951] 1 T.L.R. 8; [1951] 1 All E.R. 124.

6 *Essay on the Human Understanding*, Bk. IV, c. 16, s. 9.

7 Usually, the probability on which one must act is 'vague and quite incapable of numerical measurement' as it involves 'intrinsic doubtfulness' (Russell *Human Knowledge*, p. 357). Since 'feelings of great intensity do not have parts which are themselves feelings of less intensity', it follows that 'we need not think of degrees of acceptability as fractions like the degrees of probability in matters of chance' (Kneale, *Probability and Induction*, p. 15, 246). And, although the law is concerned only with degrees of belief which are rational, that is, with those logically justified by the evidence, yet these can be expressed only in terms of degrees of confidence. And perfect confidence, it may be remembered, is an unattainable upper limit: cf. Bentham, *op. cit.*, *Preliminary View*, c. 12.

submitted that the administration of justice requires a greater measure of precision than that so far vouchsafed by the courts.[8]

To the now traditional civil cases capable of proof by a preponderance of evidence and criminal cases sustainable only by proof beyond reasonable doubt, there is added a new type of civil case to be proved beyond reasonable doubt but not necessarily so strictly as would be required if it were a criminal case. The distinction in the recent past has been that in a criminal case a jury could find a fact only if such doubts as they had were vague, shadowy, fanciful or trivial, whereas in a civil case their doubts might, in spite of their finding, be real or substantial. The distinction between trivial and substantial doubts came to be expressed in the two contrasted terms proof by preponderance of evidence and proof beyond reasonable doubt.[9] These two terms appear to have been employed to indicate respectively the minimum of proof on which it would be rational to found a belief and the maximum of proof of which in human affairs we are capable.[10] They appear, moreover, to have been commonly employed to distinguish civil [11] from criminal cases.[12] This dichotomy, which was perhaps an over-simplification, has now disappeared in order to make room for the Divorce Court's requirements of a degree of assurance higher than is normally expected in a civil case, but lower than is required in a criminal case.[13] The decision of the Court of Appeal in *Bater* v.

[8] In *Lyons* v. *Lyons* (*Carne intervening*) [1950] N.I. 181, Andrews L.C.J. declared the law to be in an unsatisfactory state which called for the intervention of the legislature or of the House of Lords to ' remove the ambiguities which have arisen from conflicting judicial opinions, and so clarify a situation, the continued retention of which would not be to the credit or advantage of legal administration '. It is submitted with respect that the subsequent decision of the House of Lords in *Preston-Jones* v. *Preston-Jones*, *supra*, does not afford the ' clarification ' which the learned Chief Justice considered so necessary.

[9] See, for example, the distinction taken in Starkie's *Evidence* (1824) I, 450–3, 514, II, 414–5.

[10] ' Moral certainty and the absence of reasonable doubt are in truth one and the same thing.' (*Taylor on Evidence*, 12th ed., p. 67.)

[11] With the exception of bastardy proceedings, where, for a reason of public policy quite distinct from that in criminal cases, proof beyond reasonable doubt is required: see 65 L.Q.R. 223, n. 32.

[12] That this distinction has been taken in the courts appears most clearly perhaps from those cases in which the proof of some matter is placed on the accused, for there the jury should be directed that ' the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond reasonable doubt; and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish ' (*R.* v. *Carr-Briant* (1943) 59 T.L.R. 300, 302). Cf. *R.* v. *Ward* [1915] 3 K.B. 696, cited in the above case as being to the effect that the accused is never placed in such a position ' as to require of him that he should prove his case beyond reasonable doubt '.

[13] The ratio decidendi of *Bater* v. *Bater*, *supra*, is that the Divorce Court's and the Criminal Court's standards are distinct. In his note upon *Preston-Jones* v. *Preston-Jones*, in 14 M.L.R. 225, Mr. Treitel concludes that no such distinction can now be drawn, since even Lord MacDermott's rejection of an analogy of the criminal law is coupled with an acceptance of ' the same general standard ' as applicable to both. As the matter stands, however, the Court of Appeal has clearly stated the existence (though not the nature) of a distinction

Bater [14] that the term 'beyond reasonable doubt' is apt to describe the standard of proof in this last type of case, while it impliedly indicates the illogicality of the former simple distinction, may nevertheless give rise to more problems than it solves. A consideration of these problems may perhaps with advantage be prefaced by an indication of the fact that the courts have recently reached their conclusion in three distinct stages, for they have decided first, that (at least some) matrimonial offences require proof beyond reasonable doubt as in criminal cases; then secondly, that proof as in criminal cases is not (always) required; and then thirdly, that, none the less, proof beyond reasonable doubt *is* required.

The earliest express equation of the standards of proof in criminal and matrimonial cases appears to be in the dictum of Lord Merriman P. in *Churchman* v. *Churchman*.[15] The Court of Appeal applied this principle to a charge of adultery in *Ginesi* v. *Ginesi* [16] and it is to be remarked that proof beyond reasonable doubt and criminal proof were there regarded as one and the same thing.[17] In *Davis* v. *Davis*,[18] however, the court held that a charge of cruelty as a ground for dissolution of marriage does not require the same standard of proof as is required in a criminal court, so that *Ginesi* v. *Ginesi* [16] could in the light of that decision be regarded as sustainable, if at all, only on the ground of the 'criminal' character of an act of adultery.[19] While the court's negative conclusion in *Davis* v. *Davis* [18] (that cruelty does not require criminal proof) is clear, it is by no means so obvious what positive requirement was then envisaged. Bucknill L.J. while agreeing that 'a slightly too high standard of proof' was set up by the trial judge (who had

between the two standards, and a rejection of this proposition is in no way necessarily implied by the decision in *Preston-Jones* v. *Preston-Jones*. Indeed, had the House considered that its decision concluded this point, one would have expected the Court of Appeal's explicit decision to the contrary to have warranted treatment less cavalier than a casual and somewhat elliptical reference in the last speech to be delivered. It is submitted, therefore, that it would be safer to regard the point as still open, though, to the present writer, the possibility of finding a formula to express the difference alleged to exist seems remote. More recently, however, Evershed M.R. has gone out of his way to utter the warning, in *Allen* v. *Allen* [1951] 1 All E.R. 724, 731, that he 'must not be taken to be asserting any direct connection in point of onus of proof' between adultery and a criminal charge.

14 [1950] 2 All E.R. 458.

15 [1945] P. 44. Although the President's pronouncement that 'the same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so called' has been judicially referred to as a dictum, Lord Merriman, in *Fairman* v. *Fairman* [1949] P. 341, expressed his doubt whether it was merely *obiter*.

16 [1948] P. 179.

17 Adultery 'must be proved with the same strictness as is required in a criminal case. That means that it must be proved beyond reasonable doubt to the satisfaction of the tribunal of fact' (*per* Tucker L.J., at p. 181).

18 [1950] P. 125.

19 See 66 L.Q.R. 35, 38, and *per* Denning L.J. in *Gower* v. *Gower* [1950] 1 All E.R. 804, 806.

required criminal proof), held nevertheless (at p. 127) that ' if there is any reasonable doubt at the end of the case, then the burden of proof has not been discharged '. There is, however, nothing in the judgment of Denning L.J. to indicate that proof beyond reasonable doubt is required, for the learned Lord Justice expressly states that the statutory burden of ' satisfying ' the court [20] ' is not a burden of extraordinary weight '.[21] Indeed, in a later passage (at p. 129) the opinion is indicated that if criminal proof is not required, proof beyond reasonable doubt is not required. ' There is, it seems to me ', said the learned Lord Justice, ' a danger in asserting, what the statute does not assert, that the charge must be proved beyond reasonable doubt, because of the temptation it affords to give effect to shadowy and fanciful doubts. That standard is a proper safeguard to persons accused in criminal cases, but, if applied in divorce cases, it may mean unjustly depriving an injured party of a remedy which he ought to have '. This statement of law, it may be said with respect, not only indicates the rule, and the reason for the rule, which justice between the petitioner and respondent calls for, but it also implies that whenever a standard of proof higher than a balance of probability is required, it can be justified only on the ground of the *consequences* of the judgment, and not on the ground of the nature of the fact in issue.[22] In *Bater* v. *Bater*,[23] however, both Bucknill and Denning L.J. agree that, although criminal proof is not required in the Divorce Court, nothing less than proof beyond reasonable doubt will suffice. Thus, ' the phrase " reasonable doubt " can be used just as aptly in a

[20] By s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, as substituted by s. 4 of the Matrimonial Causes Act, 1950, the court must be ' satisfied on the evidence that the case for the petitioner has been proved '. In *Lyons* v. *Lyons* (*Carne intervening*), *supra*, Andrews L.C.J. points out that the statute ' does not expressly define the standard of proof required '.

[21] It will be suggested below that an ' ordinary ' burden of proof is merely that of establishing a preponderance of probability, for it is rational to believe what is probable, though it may not always be rational to act upon such a belief: see n. 44 *infra*. This has always been the standard of proof in civil cases: see Dyer C.J. in *Newis* v. *Lark*, Plowd. 412, cited by Willes J. in *Cooper* v. *Slade*, 6 H.L.C. 746, 772.

[22] It is submitted that this was, unhappily, lost sight of in *Bater* v. *Bater* [1950] 2 All E.R. 458.

[23] [1950] 2 All E.R. 458. This decision is implicit in the earlier judgment in *Gower* v. *Gower* [1950] 1 All E.R. 804, but it might be submitted that the matter was there left inconclusive for, adultery having been proved by an irresistible inference leaving no doubt, the court's pronouncement of what lower standard might have sufficed might be said to be *obiter*. Bucknill L.J. after distinguishing between proof in civil cases (' on a very small margin of preference ') and that in criminal cases (' beyond reasonable doubt ', that is, excluding ' any reasonable hypothesis consistent with innocence ') expressly applied the latter test, and with this Denning L.J. agreed, subject to the caveat that the court was not irrevocably committed to a requirement of criminal proof of adultery. It may be, therefore, that the standard of proof actually adopted in *Gower* v. *Gower* indicates no more than that such standard was in fact reached and not that such standard is required. The finding of the trial judge was reversed because ' he required an exceedingly high standard of proof ' (*per* Denning L.J., at p. 805), though it is difficult to see what stricter test is applicable than that expressly applied by the Court of Appeal, *viz.*, the exclusion of ' any reasonable explanation consistent with innocence '.

civil or a divorce case as in a criminal case ' (*per* Denning L.J. at p. 459). But, if this be so, it is a little difficult to understand the earlier warning of ' the danger in asserting, what the statute does not assert, that the charge must be proved beyond reasonable doubt '. The change of opinion implicit in *Davis* v. *Davis* [24] has apparently been reached by the persuasion of Denning L.J. against his earlier (and, it is submitted with great respect, better) judgment.[25] Against that judgment, and that of the court in *Ginesi* v. *Ginesi*,[26] there has prevailed the opinion [27] that, although the Divorce Court will not expect criminal proof, it will not be content with ' normal ' civil proof, for the court must be satisfied, and ' to be satisfied and at the same time to have a reasonable doubt seems to me to be an impossible state of mind ' (*per* Bucknill L.J. at p. 458). It is submitted with respect that this is to overstate the meaning of the word ' satisfied ', a word which has traditionally been employed to describe the state of mind required of a jury in civil cases.[28] A jury may be satisfied in such cases and still have that ' modest doubt ' which, Shakespeare [29] tells us, ' is called the beacon of the wise '.

But if the term ' proof beyond reasonable doubt ' is no longer to be confined to defining the minimum required in a criminal court, and is to be employed to describe the minimum required in some civil cases [30] (on the ground that the reasonableness of doubts differs from case to case) why should not the term be used in all civil cases, as logic would then demand? If it be true that ' a doubt may be regarded as reasonable in the criminal courts which

[24] [1950] P. 125.

[25] It may further be remarked that, on the occasion of his explanation of the standards of civil and criminal proof in *Miller* v. *Minister of Pensions* [1947] 2 All E.R. 372, the learned Lord Justice would appear to have been satisfied to employ the traditional expressions ' preponderance of probability ' and ' proof beyond reasonable doubt '.

[26] [1948] P. 170.

[27] Consistently advocated by Bucknill L.J. in *Davis* v. *Davis*, *Gower* v. *Gower* and *Bater* v. *Bater*, *supra*.

[28] See, for example, the Reporter's note in *Magee* v. *Mark* (1861) 11 Ir.C.L.R. 449, 469. Though ' satisfy ' may mean ' to set free from doubt or uncertainty ', it may also mean ' to be accepted as all that can reasonably be desired '. A person may be satisfied without being fully convinced; he may be satisfied by what is *sufficient* in the circumstances. In the Universities, it may be surmised, pass students frequently ' satisfy the examiners ' in this sense. So, too, in civil proceedings, for ' it is in the very nature of a vast number, and of probably the majority, of disputed questions of fact in civil controversies, that to whatever side the tribunal inclines, it determines with some mixture more or less, of doubt in its judgment. But a firm mind ought (not) . . . to forebear from deciding by reason of a doubt ' and ' the jury, although they may consider the case a doubtful one, may, upon weighing the evidence, and finding their minds *sufficiently* influenced by a preponderance of it on one side, *be satisfied of the fact*, by that preponderance . . . ' (*per* Pigot C.B., in *Magee* v. *Mark*, *supra*, at pp. 463 and 468). Cf. Bentham, *op. cit.*, Bk. I, c. 6, s. 3.

[29] *Tr. & Cr.*, ii, ii, 16.

[30] *Per* Bucknill L.J. [1950] 2 All E.R. at p. 458.

would not be so in the civil courts ',[31] then, in the only sense in which this is true, all judgments should be beyond reasonable doubt, for the reasonableness of the doubt is thereby related not to the belief but to the action which is to follow upon the belief, on the principle that ' of two hypotheses it may be rational to act on the less probable if it leads to the greater good '.[32] For the purpose of rational belief per se, however, one must ignore all doubt except that which tips the scales over to improbability; as between a fact and its contradictory, a rational man must believe that which has the barest probability. Any court which ' finds ' a fact asserts that it has reasons for believing the existence of the fact and for behaving as if these reasons justified a belief in the certainty of the existence of the fact.[33] The doubts which it has, and reasonably has, are dismissed as impracticable and the question is treated as settled.[34] This is universally true of all findings of fact, no matter what the nature of the fact found, the purpose of the finding or its practical consequences. It is as true of a finding on a balance of probabilities as it is of a finding beyond reasonable doubt. When a court finds for a plaintiff on a preponderance of probability, it is obvious that it has doubts, but it has less doubts about the plaintiff's case than about the defendant's. Equally, when a court finds a fact beyond reasonable doubt, it does not find the fact beyond doubt. It finds (i) that it has doubts, (ii) that the existence of these doubts is reasonable (because of the limitations of the inferences of common sense and science, by reason of which

[31] *Per* Denning L.J. [1950] 2 All E.R. at p. 459. So far as concerns beliefs *per se* this statement is not true, for evidence of fact must have the same effect upon the beliefs of a rational tribunal, no matter what the consequences of those beliefs. The statement is true, however, of actions based on those beliefs.

[32] Keynes, *Treatise on Probability*, p. 307. Lord Keynes' use of the term ' probable ' to cover not only that which it is rational for us to believe but also the hypothesis on which it is rational for us to act is a source of confusion, for the latter is a preference rather than a rational probability; it is an estimate *as to the future*. Of the making of this estimate, Lord Keynes says no more than that we should determine the probabilities before acting, but Leibniz (cited by Keynes, *op. cit.*, p. 311, n. 1) proposed that if a litigant's claim to a sum of money is twice as probable as that of his opponent, the sum should be divided between them in that proportion. Lord Keynes adds his opinion that ' the doctrine seems sensible ' but it appears never to have been acted on.

[33] ' The great excellency and use of the judgment is to observe right, and take a true estimate of the force and weight of each probability; and then casting them up all right together, choose that side which has the overbalance ' (Locke's *Essay on the Human Understanding*, Bk. IV, c. 17). The earliest legal dissertation on evidence—Gilbert's—adopts Locke's conclusions and terminology and opens with the proposition that ' what is to be done, in all trials of right, is to range all matters in a scale of probability, so as to lay most weight where the cause ought to preponderate '. In practice, ' the result is seldom more than a slight elevation or depression of one of two or more sets of comparative probabilities ' (Powell's *Law of Evidence* (1868) p. 2); and see 65 L.Q.R. 220, n. 3, and n. 4).

[34] ' We should, in practice, treat as certain whatever has a very high degree of probability. This is a matter of common sense ' (Russell, *op. cit.*, p. 417). When the court does this, it does not assert that it knows something which it does not, and cannot in the nature of things, know, but it none the less acts as if it had such knowledge.

limitations, its conclusions can be no more than probable); but (iii) that, because of the trivial nature of these doubts, it would be reasonable to act as if they did not exist. Thus for a conviction in a criminal case any hypothesis consistent with innocence must be considered so unlikely that it can be treated in practice as impossible. Proof beyond reasonable doubt, therefore, becomes proof beyond those doubts which cannot be ignored in practice.[35] But so in this sense is all proof in a court of law. It is, therefore, submitted that, if the term proof beyond reasonable doubt is no longer to be related to belief per se and employed as a term of art to define proof in criminal cases, it should logically be applied equally to all cases.[36]

It would appear, therefore, that in a court of law, reasonable doubt is not ' simply that degree of doubt which would prevent a reasonable and just man from coming to a conclusion ',[37] it is that doubt which would prevent his *acting* on that conclusion.[38] The question for the courts is not simply whether an opinion is rational, but whether it is rational to act upon it, for a rational belief as to

[35] Reasonable doubt is a doubt which must be taken into account. Normally, in a civil case, account must be taken of a doubt only if it results in a rational opinion that the fact in issue is less likely than not, whereas in a criminal case account must be taken of a doubt if it results in a rational opinion that the contradictory of the fact in issue is more than a ' remote possibility '. The mere possibility of the truth of a hypothesis consistent with innocence will not entail an acquittal, for, if it would, a jury would then be permitted ' to acquit on light, trivial or fanciful suppositions and remote conjectures ' which would be ' a virtual violation of the jurors' oath ' (Starkie, *op. cit.*, I. 514). The impossibility of the accused's hypothesis need not be demonstrated; it is enough to show that it is ' not in the least likely '. This is a recognition of the fact that any calculation of probabilities *a posteriori* must be uncertain, for ' probability begins and ends in probability ' (Keynes, *op. cit.*, p. 322). But the difference between the civil and criminal jury is none the less important. Might one venture to call the civil jury probabiliorists and the criminal jury (on occasion) probabilists?

[36] It is submitted, however, that it would be better to confine the term ' beyond reasonable doubt ' to criminal cases and to accept Starkie's proposition (*Evidence*, I, 451) that ' the distinction between full proof and preponderance of evidence is in its application very important '. The suggestion made by Dr. Allen (*Legal Duties*, p. 287) that there is no distinction between the two appears to be based on the view that the highest degree of assurance is necessary for all conclusions of fact in the courts, because otherwise a jury need not take the same amount of care in a civil as in a criminal case. It is submitted that this does not follow. The jury must be equally careful—to apply whichever of the respective standards the law requires.

[37] *Per* Denning L.J. in *Bater* v. *Bater* [1950] 2 All E.R. 458. If by ' conclusion ' is meant belief in, or assent of the mind to, a proposition rather than its contradictory, a rational man is held from such conclusion only when the doubt is strong enough to establish the improbability of the proposition and the consequent probability of its contradictory.

[38] The court may hold a petitioner to be justified in his claim to a reasonable belief in his wife's adultery on evidence upon which the court could not award him a decree: *Douglas* v. *Douglas* [1951] P. 85. But where a husband has attempted and failed to establish his wife's adultery beyond reasonable doubt, it is no longer open to him to allege that he still has a reasonable belief in her adultery: *Allen* v. *Allen* [1951] 1 All E.R. 724. But this conclusion is not dictated by logic; it is a matter of policy, as in the case of the prisoner given the benefit of the doubt (see *per* Evershed M.R., at p. 731).

the probability of an event is not in itself a conclusive guide to rational action.[39] The law realises that it must always run the risk of failure when it acts (as it must) on probability alone, and in assessing what is best to be done there is a double risk of error—that of a wrong assessment of events of the past (and a consequent erroneous belief) and that of a wrong assessment of the future (and a consequent injudicious act). The question is always that of the degree of risk which is justified and the risk is assessed primarily in terms of the *consequences* of the judgment to be pronounced. While it is logic which dictates the rationality of belief, it is public policy which dictates the rationality of action. Logic compels a jury to find a fact *A* rather than its contradictory *B*, even when their doubts of *A* are substantial, provided their doubts of *B* are more substantial. If it were not for considerations of public policy, it would be irrational to ask a jury to find the contradictory of a fact merely because they had substantial doubts about the fact itself. It is such reasons of policy (based upon the consequences of the jury's finding) which explain why a jury may be instructed to return a verdict of not guilty even though their doubts concerning the accused's story outweigh those concerning that of the prosecution. The jury's finding flies in the face of what reason would dictate,[40] were it not for considerations of public policy. The requirement of strict proof in criminal cases is, therefore, explained only in terms of the consequences of the fact found, it cannot be explained in terms of the nature of the *factum probandum*.[41] If, therefore, one is to accept the Court of Appeal's decision [42] that proof beyond reasonable doubt is to be required in some civil cases only,[43] it would seem to follow that the selection of such cases must depend upon the nature of the consequences and not upon the nature of the facts to be proved.

But Denning L.J. makes clear his opinion [44] that the selection of those cases which require proof beyond reasonable doubt depends on the nature of the facts in issue. There is no absolute standard proof. In civil cases ' the degree depends upon the subject-matter '

[39] I may reasonably believe there will be little traffic along my shortest route, but I may nevertheless behave rationally if I take a longer route in order to avoid the possibility of missing a train. Similarly, a jury may reasonably believe that an accused is probably guilty, but may nevertheless behave rationally if they return a verdict of not guilty in order to avoid the possibility of convicting an innocent man. The missing of the train and the consequences of convicting the accused are extraneous factors in assessing the probability of the facts in issue, but are all-important in a consideration of the rationality of conduct.

[40] ' That a man should afford his assent to that side on which the less probability appears to him, seems to me utterly impracticable ' (Locke, *Essay*, Bk. IV, c. 20, s. 15). The jury, therefore, by their verdict of not guilty may perpetrate a fiction.

[41] Lord Oaksey's dictum ([1951] 1 All E.R., at p. 133) that ' what is reasonable doubt . . . varies in practice according to the nature of the case and the punishment which may be awarded ' is true only in this sense.

[42] In *Bater* v. *Bater* [1950] 2 All E.R. 458.

[43] This is clearly envisaged by both Bucknill and Denning L.JJ.

[44] [1950] 2 All E.R. at p. 459.

and, although strict criminal proof is not required, it is necessary to establish ' a degree of probability which is commensurate with the occasion ', and ' likewise a divorce court should require a degree of probability which is proportionate to the subject-matter '. Hence, in civil actions fraud will naturally require a higher degree of probability than negligence, while in criminal cases, the proposition ' as the crime is enormous so ought the proof to be clear ' is to be read as a reference not only to the weight of the evidence required, but also to the standard of credence to be induced by it.[45] But it cannot be over-emphasised that the reasonableness of one's doubts depends on the antecedent improbability of the fact in issue when considered in conjunction with the weight of the evidence adduced; it cannot depend solely on ' the nature of the subject-matter '. The nature of the subject-matter is only one element to be considered in assessing the antecedent improbability. The maxim cited by the learned Lord Justice as being relied on ' by many great judges ' is one which indicates no more than that doubt is less easily dispelled in a serious than a trivial charge because of the greater antecedent improbability of the serious charge,[46] which, therefore, requires a greater amount of evidence to reach a balance of probability in its favour. Thus, the difference in degrees of antecedent improbability affects the quantity of evidence required to dispel reasonable doubt; it does not in any way affect the *standard* of proof to be achieved for this purpose.[47] The reasonableness of one's doubts will differ from case to case, not according to the nature of the facts to be established, but according to the antecedent improbability of these facts, relatively to the weight of evidence. Thus, the reasonableness of a doubt may differ as between a case of fraud and a case of negligence (as Denning L.J. remarks [48]); but it may also differ as between one case of fraud and another, and as between one case of negligence and another—and the difference will not arise exclusively out of the nature of the fact in issue per se. In a serious charge, one may have further to go to reach the goal of rational belief, but it is not natural (as Denning L.J. asserts it to be [48]) that that goal should itself recede into some standard higher than rational belief calls for.[49]

[45] The illogicality of this interpretation of the maxim has frequently been remarked on. The maxim does not relate to standards of proof; it is concerned with amounts of proof: see, *e.g.*, Wills on *Circumstantial Evidence* (7th ed.) c. 6, r. 5 (pp. 330–5).

[46] The ' plain reason ' for the maxim is ' that there is . . . an immense antecedent improbability to be got over and subdued by proof ' (Reporter's note to *R.* v. *White*, 4 F. & F. 383). But even this assumption is no more than generally true.

[47] The earliest writers appear to assume this: see, *e.g.*, Gilbert's *Law of Evidence* (6th ed., p. 133).

[48] In *Bater* v. *Bater* [1950] 2 All E.R. 458, 459. Indeed, the learned Lord Justice asserts that the reasonableness *will* differ, but this, it is submitted with respect, is logically inaccurate, though no doubt true of the vast majority of cases.

[49] ' A civil court, when considering a charge of fraud, will *naturally* require a higher degree of probability than that which it would require if considering

If, then, proof beyond reasonable doubt is a standard to be applied in some civil procedings, and a selection of these proceedings is to be made, it would seem that that selection cannot be logically dictated by the subject-matter.[50] The selection will have to be made a matter of public policy dependent upon the consequences of the proceedings. The law has fixed its standards of proof in terms, not of rational belief, but of the ultimate consequences of acting upon the conclusions reached. It is this which explains the strict proof required in criminal cases (a measure of mercy thrown to the accused) and in legitimacy cases (for the protection of the family). Is there any such requirement of social policy in the Divorce Court? The present writer's suggestion [51] that the Divorce Court's arrogation to itself of ' a peculiar duty of protecting the sanctity of marriage ' [52] might alone explain the requirement that adultery be proved beyond reasonable doubt became untenable in the light of the Court of Appeal's decision in *Davis* v. *Davis*,[53] but it is submitted that the acceptance by the House of Lords [54] of requirement of some higher standard of proof for adultery was in justificatory terms which come within the phrase suggested above and which necessitate the extension of this requirement to all grounds of dissolution of marriage. It is submitted that the essence of the decision is to be found in Lord MacDermott's speech,[55] to the effect that the higher standard of proof is required by ' the public interest which requires that the marriage bond shall not be set aside lightly or without strict enquiry ', so that it would be ' out of keeping with the anxious nature ' of the statutory provisions to dissolve a marriage upon proof which was not beyond reasonable doubt. And although his Lordship rejected any analogy drawn from the criminal law, he concluded that the reason for the requirement of the higher standard was in each case to be found ' in the

whether negligence was established ' (p. 459). It is submitted with respect that there is nothing natural in requiring proof beyond reasonable doubt. Of the requirement of that standard in the criminal courts, it has been said that ' it is the substantive criminal law which fixes the amount of conviction to be obtained in the mind of the tribunal ' (Thayer, *Preliminary Treatise on the Law of Evidence* (1898) pp. 336–7).

[50] It is suggested by Denning L.J. that a degree of probability ' as low as 51 per cent. ' would be enough ' in some cases '. But, in judging between a fact and its contradictory, 51 per cent. probability must suffice for reasonable belief in *all* cases, though it might not suffice in a consideration of the action to be based on that belief. Even where a case will ' draw consequences of moment after it ', says Locke, ' the greater probability will determine the assent ' (*Essay*, Bk IV, c. 20, s. 16).

[51] 65 L.Q.R. 220.

[52] *Latey on Divorce*, 13th ed., p. 112 and the dicta there cited. Cf. *per* Bucknill L.J. in *Barker* v. *Barker* [1950] 1 All E.R. 812, to the effect that ' no one should regard a divorce petition as being in the same category as a writ of summons in a civil action ' (p. 813), for ' the State is an interested third party in a divorce petition. Its interest is to see that due regard is paid to the binding sanctity of marriage ' (p. 812). The functions of the judge in the Divorce Court cannot be said to be in accord with the accusatorial nature of common law proceedings: see, *e.g.*, 67 L.Q.R. 67, 78.

[53] [1950] P. 125; see 66 L.Q.R. 38.

[54] In *Preston-Jones* v. *Preston-Jones* [1951] 1 T.L.R. 8; [1951] 1 All E.R. 124.

[55] [1951] 1 T.L.R., at p. 23.

gravity and public importance of the issues '. If, however, it be thought that some such explanation will not suffice (or is considered unnecessary) to rationalise the requirement of the higher standard, there would appear to be no reason why a petitioner for divorce should not be entitled to a decree, upon establishing a 51 per cent. probability of his allegation (whatever it might be). If public policy, in the form of the requirement of some special protection to be afforded to the sanctity of marriage, does not intervene in the conflict between the parties,[56] why should not a petitioner for divorce be entitled in justice to ask the court to act upon its rational belief based upon the 51 per cent. probability of the story he has told? Why should the court act upon the respondent's improbable story, if public policy is indifferent in the matter? If, on the other hand, there is some principle of public policy requiring for proof of matrimonial offences something more than a mere balance of probability, if, that is, the requirement of the higher standard of proof is to be justified on the ground that it is necessary to prevent a too facile disruption of the marriage tie, it would seem inevitable that no distinction can be drawn between the standard of proof required for one ground of divorce[57] and that for any other.

It remains, therefore, to consider whether, after its decision in *Preston-Jones* v. *Preston-Jones*,[58] it is still open to the House of Lords to permit a petitioner to establish adultery by something less than proof beyond reasonable doubt. It will be admitted that, since their Lordships were expressly unanimous in their requirement of such a standard, clear reasons would be necessary to reject this conclusion as the ratio decidendi. In his learned note in 14 M.L.R. 225, Mr. Treitel advances two reasons. In the first place, he suggests that the negative conclusion that scientific certainty is not required does not entail the enunciation of any positive standard, so that proof beyond reasonable doubt is the highest, not the lowest, standard to be achieved. While this is strictly true, their Lordships appear nevertheless to have conceived the question at issue to be whether the petitioner's evidence reached the *minimum* standard required. Indeed, had they been concerned with the maximum

[56] It may be remarked, however, that in *Harriman* v. *Harriman* [1909] P. 123, Fletcher Moulton L.J. takes the distinction (at p. 142) between 'proved as a fact' and 'merely proved inter partes'. Thus a judgment inter partes founded on a court's acceptance of an allegation of cruelty is not binding on the Divorce Court, which may still be 'entitled and bound to require such additional evidence as should be sufficient to convince it of the fact'. It is submitted that the peculiar nature of the Divorce Court's decree affecting status can alone explain this conclusion; and the more recent cases upon the rule in *Harriman* v. *Harriman* appear to emphasise this point.

[57] Or nullity. In *Cooper* v. *Crane* [1891] P. 369, for example, it was said that the annulment of a marriage on the ground of lack of consent will be decreed only if clear and cogent evidence rebuts the presumption that the parties consented.

[58] [1951] 1 T.L.R. 8; [1951] 1 All E.R. 124.

standard, Lord Oaksey's dissent would be meaningless, for in his opinion the petitioner failed because his evidence did not establish adultery beyond reasonable doubt. Had his Lordship thought some lower standard sufficed, he could not have dissented from the majority for the reason stated. Similarly, if the other members of the House had considered it possible that adultery could be established on some lower standard, one would have expected it to be remarked that Lord Oaksey's dissent was not justified by the reason given for it. ' The question, as I see it ', said Lord Simonds (at p. 129) ' is whether the court ought to accept this evidence as adequate to justify a finding that beyond all reasonable doubt the child was not the child of the husband '.[59] But if such proof were not required as a minimum, this could not have been the question at issue. Mr. Treitel's second reason for rejecting the decision as conclusive upon the standard of proof of adultery is that the standard was here required, not by the allegation of adultery per se, but because of its consequence, *viz.*, that of bastardising the child. But although this consequence is referred to by their Lordships, there would appear to be no warrant for Mr. Treitel's suggestion that ' the unusually heavy burden ' placed upon the petitioner arose from the presumption of legitimacy, so that in the absence of such a presumption the burden of proof (to rebut a mere presumption of innocence) would be lighter. Indeed, in another connection, Lord MacDermott expressly rejects the contention that there is one standard of proof where a child's status is in issue and another where adultery simpliciter is to be established.[60] It is submitted that it would be safer to assume that it is no longer open to a petitioner to prove adultery at a standard lower than proof beyond reasonable doubt. But the decision still leaves open the question of the meaning of proof beyond reasonable doubt and its relation to criminal proof.

In the Australian case of *Wright* v. *Wright*,[61] Dixon J., in adopting a civil rather than a criminal standard of proof for matrimonial causes, suggested that ' the difference in effect is not so great as is sometimes represented '. Similarly, Bucknill L.J.[62] has referred to the question as a somewhat theoretical one and Denning L.J. has suggested [63] that ' the difference of opinion . . . may well turn out to be more a matter of words than anything else '. It may well be, however, that the parties in the cases cited above regard this dispute about ' a matter of words ' as anything but academic, since the appellate tribunal based its decision in

[59] It would appear that Lord MacDermott also saw this as ' the real issue ' (at p. 138).

[60] The absence of a requirement of scientific certainty ' is no less so in cases of adultery where the circumstances are such as to involve the paternity of the child ' (at p. 138); that is, the same standard applies whether the evidence bastardises the child or no.

[61] 77 C.L.R. 191, 210, cited in 66 L.Q.R. 37.

[62] In *Gower* v. *Gower* [1950] 1 All E.R. 804.

[63] In *Bater* v. *Bater* [1950] 2 All E.R. 458, 459.

their cases upon the correctness of the terms used by the judges who in the first instance tried to assess the probability of the stories they told. Terminology is here all-important. If, therefore, the Divorce Court is to borrow the term ' proof beyond reasonable doubt ' from the criminal courts, while denying any intention of imposing the strict standard of proof required in those courts, it would seem imperative that some new terminology be devised for the clearer delineation of the ' not too little and not too much ' which is thus required. It is not proposed here to speculate upon such improvements,[64] but it may be remarked that, even with a more precise terminology, the continued application of the term ' proof beyond reasonable doubt ' to cases other than criminal cases might still continue to cause difficulties—for example, in the nature of the direction to be given in those cases in which an accused has placed upon him the proof of some matter by way of defence.[65] The development of a more precise terminology, however, might leave the courts less open to Bentham's jibe [66]: ' Lawyers of the *Roman* school—lawyers of the *English* school—it will be seen into what awkward shifts—into what inadequate and uncharacteristic modes of expression they are driven—driven by their endeavour to give expression to *degrees of probability* without having recourse to numbers '.[67]

Conclusion

(1) The Court of Appeal has decided (i) that although (some) matrimonial offences may be established by proof which is not so strict as that required in a criminal court, such offences cannot be established except by proof beyond reasonable doubt; and (ii) that the determination of the cases which require this abnormally high standard must depend on the

[64] The present writer begs leave to take refuge in the suggestion in n. 35, *supra*, that, whatever the logic of the matter, it would be more convenient in practice to confine the term ' proof beyond reasonable doubt ' to criminal cases and those (*e.g.*, bastardy cases) which are expressly equated with criminal cases so far as concerns the standard of proof. Support may be found in *Lyons* v. *Lyons*, *supra*, where Andrews L.C.J. declares himself to be more anxious than the Court of Appeal appears to be ' to avoid a phraseology which lawyers have hitherto been in the habit of applying only to criminal cases '.

[65] See n. 11, *supra*. In *Preston-Jones* v. *Preston-Jones*, Lord Simonds is reported to have said that ' the utmost that a court of law could demand is that the fact in issue should be established beyond all reasonable doubt '. If this statement be related to courts generally, it is somewhat difficult to understand how proof in the Divorce Court differs from that in a criminal court. Lord Simonds' reliance on the further proposition that ' it was to him repugnant that a Court of Justice . . . should require evidence to displace fantastic suggestions ' is strongly reminiscent of Denning L.J.'s description of proof in criminal cases in *Miller* v. *Minister of Pensions* [1947] 2 All E.R. 372.

[66] *Rationale of Evidence*, *Preliminary View*, c. 6.

[67] Bentham had ' recourse to numbers ' because of the alleged ' incapacity of ordinary language for expressing degrees of persuasion and probative force '. It is submitted that there is no incapacity of language, *i.e.*, essential vagueness, in this matter; there are only inconsistencies, *i.e.*, inessential vagueness. Though incapacity is not, inconsistency is, curable.

subject-matter of the proceedings. The House of Lords would appear to have accepted the requirement of proof beyond reasonable doubt for allegations of adultery.

(2) It is submitted (i) that in the only sense in which proof beyond reasonable doubt is applicable to some civil cases, it is applicable to all; but, (ii) that, if a selection of such cases is to be made, it should be in accordance, not with the nature of the respective facts in issue, but in accordance with the consequences of the judgments to be given; and (iii) such being the case, one ground of divorce cannot be distinguished from another, so far as concerns the minimum standard of proof required.

(3) It is further submitted that if some (civil) cases may be established by a preponderance of evidence, other (civil) cases require proof beyond reasonable doubt and other (criminal) cases demand a yet higher degree of proof, a recasting of terminology is an urgent necessity.

J. A. Coutts.

THE PLACE OF PARLIAMENT IN THE LEGISLATIVE PROCESS

[*Continued from p.* 296]

Part II

In the attempt to discover what provisions should be inserted in a Bill and what should be left to Ministerial regulation, little progress can be made unless Acts and regulations are themselves examined. Three different types of governmental activity have been chosen for this purpose. The first deals with factory conditions; the second with the setting of standards for a profession; and the third with National Insurance provisions.

1. Cotton Cloth Factory Acts

The history during this century of this legislation is particularly informative. Sections 90–95 of the Factory and Workshop Act, 1901,[1] apply to cotton cloth factories. Section 90 deals with humidity and enacts that the amount of moisture in the atmosphere must be in accordance with the Schedule which compares grains of vapour per cubic foot of air with dry bulb thermometer readings. The next section gives the Secretary of State power to alter the table of humidity with an obligation to lay the alteration before Parliament. Section 92 regularises in detail the use of two sets of standardised wet and dry bulb thermometers. Section 93 requires a cotton cloth factory occupier to inform the chief inspector of factories if artificial humidification is to be used and requires an inspector to examine the factory at least once in every three months. Section 94 lays down certain rules for the protection of health and deals with water pipes, ventilation (the proportion of carbonic acid in the air must not be greater than nine volumes of carbonic acid to every 10,000 volumes of air), the annual white-washing of roofs and the provision of cloakrooms. Section 95 fixes penalties for failure to comply with these instructions.

In 1907 a Departmental Committee was appointed following further complaints about artificial humidification, which the workers' representatives considered should be totally abolished. However, these representatives accepted the Report of the Committee in 1911 as an alternative, with the proviso that the position should be reconsidered within the period of three years. The Report led to the Factory and Workshop (Cotton Cloth Factories) Act,

[1] 64 Vict. & 1 Edw. 7, c. 22; similarly Cotton Cloth Factories Act, 1889 (52 & 53 Vict. c. 62).

1911,[2] section 1 (1) of which gave the Secretary of State power to make regulations to give effect to the recommendations contained in the Report. The Secretary of State made regulations [3] accordingly which superseded sections 90, 91, 92 and 94 of the 1901 Act. There are ten regulations and a Schedule. They contain detailed and technical provisions relating to hygrometer readings, water purity (water absorbing from acid solution of permanganate of potash in four hours at sixty degrees more than half a grain of oxygen per gallon of water may not be used), temperatures, pipes, dimensions and siting of sheds, white-washing, ventilation and cloakrooms (not less than one peg per person employed and a minimum distance of 18 inches between the pegs).

Many conferences followed the 1914–1918 war, and another Departmental Committee, which was set up in 1924, reported in 1928. The Factory and Workshop (Cotton Cloth Factories) Act, 1929,[4] followed the precedent of the 1911 Act by empowering the Secretary of State to make regulations to give effect to the recommendations contained in the Report of the Departmental Committee. On this occasion, however, the principle of such delegation was strongly opposed in the House of Lords. On the Second Reading debate,[4a] Lords Banbury, Carson, Gainford and the Marquess of Reading opposed the suggested procedure, especially as they asserted that no one knew what was recommended in the Report. On the Committee stage,[5] an amendment was proposed to put the regulations in a Schedule but this was opposed by the Marquess of Reading on the ground of its great inconvenience. Lord Desborough did much to weaken the case of the Opposition by pointing out that the Report had been before Parliament as a Command Paper for a whole year and that no member of the House of Lords had asked for a copy. The Bill met with no opposition in the House of Commons.[6] Under the 1929 Act twelve regulations were made [7] replacing the regulations made under the 1911 Act. Ten of these re-enact with only small modifications the earlier regulations, and the other two deal with the duties of employed persons to report defects and not to interfere with hygrometers, means of ventilation, heating or humidification.

Finally, section 52 of the consolidating Factories Act, 1937,[8] deals with humid factories. Subsection (1) substantially re-enacts section 93 of the 1901 Act (which section was not affected by the later Acts). Subsection (2) substantially re-enacts the first four of the regulations made under the 1929 Act which, in turn, were little

[2] 1 & 2 Geo. 5, c. 21; similar wording appeared in the Cotton Cloth Factories Act, 1897 (60 & 61 Vict. c. 58, s. 1).
[3] S.R. & O. 1911 No. 1259.
[4] 19 & 20 Geo. 5, c. 15.
[4a] 72 H.L.Deb. 5s., cols. 930–44.
[5] *Ibid.*, cols. 1182–93.
[6] 226 H.C.Deb. 5s., cols. 1468–70, 1568–70.
[7] S.R. & O. 1929 No. 300.
[8] 1 Edw. 8 & 1 Geo. 6, c. 67.

different from the regulations made under the 1911 Act. Subsection (3) provides that only one hygrometer shall be necessary if the chief inspector gives his written permission. Of the 1929 regulations 5–12, which are omitted from the 1937 Act, those relating to temperature, white-washing and ventilation may be covered by the general provisions of sections 1, 3 (3) and 4 (2) of the 1937 Act, though it is to be noted that similar general provisions also existed in the 1901 Act,[9] where it was thought necessary to make the additional provisions contained in sections 90–95. Five of the 1929 regulations do not appear in the 1937 Act. The Factories Bill, 1937, was discussed at great length in both Houses of Parliament and many amendments were tabled.[10] On this clause, however, no discussion is reported and no amendment proposed; two small drafting alterations were made but otherwise the clause passed into law in the form in which it was introduced into Parliament.[11]

Dr. Allen calls the 1929 Act, which gave the Secretary of State power to 'make regulations for the purpose of giving effect to the recommendations contained in the Report' of the Departmental Committee, 'an outstanding example of delegation of principle' and 'an unprecedented form of delegation'.[12] In fact, the words of the Act are almost identical with the Acts of 1897 and 1911. Dr. Allen continues: 'The Department then issued Regulations which . . . stood until 1937 when they were repealed by the Factories Act of that year (s. 52) and were re-enacted in the body of the statute in a much-condensed form. . . . It is not easy to see why they could not have been enacted in this form in the first instance, or why, if they were "too technical" for Parliament in 1929, as seems to have been supposed, they ceased to be so in 1937'.[13] But, as we have seen, the provisions of section 52 of the Factories Act, 1937, 'condensed' the regulations by the process of omitting more than a half of them from that section. Moreover, the objection raised by the Marquess of Reading to the insertion of the regulations in the Act on the ground of inconvenience remains valid, and the 1937 Act itself empowered the making of detailed and technical regulations.[14] Dr. Allen's last observation begs the whole question. It is by no means certain that the regulations had ceased to be too technical in 1937; indeed the attitude of Parliament to this extremely intricate section is more likely to have resulted from inability to argue with its provisions than from agreement with its technicalities. To summarise this history. In 1901, five sections of an Act give certain rules. In

[9] Sections 6, 7.
[10] 320 H.C.Deb. 5s., cols. 619–726, 857–965; 325 H.C.Deb. 5s., cols. 213–336, 391–516, 1123–63; 326 H.C.Deb. 5s., cols. 3021–5, 3244–71 (H.L. amendments considered). *Parliamentary Papers*, 1936–7, Vol. VII.
[11] *Parliamentary Papers*, 1936–7, Vol. II.
[12] *Law and Orders*, p. 121.
[13] *Ibid.*, pp. 121–2.
[14] See S.R. & O. 1938 No. 347. Also No. 611.

1911, following the precedent of an Act of 1897, a second Act gives the Secretary of State power to make regulations which supersede four of the five sections. In 1929, a third Act gives a similar power. In 1937, a fourth consolidating Act includes certain of the regulations made, but empowers the Secretary of State to make regulations modifying the Act.

Factory conditions have long been considered a most important general and social question. Parliament has for many years closely examined provisions with regard to age limits, hours of work, overcrowding and conditions of work. These are essentially subjects which affect the whole country; they are matters of policy and of principle. But while Parliament insists that the general adequacy of ventilation and lighting shall be provided for, it must accept from the technician that ventilation is not adequate when there are more than nine volumes of carbonic acid to every 10,000 volumes of air. None of the regulations made under the 1911 Act was of the type that might profitably have been inserted in the Act. Section 93 of the 1901 Act which was specifically excluded from amendment by regulations made under the 1911 Act was the only section which involved an important principle—that of report and inspection. Nothing was gained by reintroducing these highly technical details in the 1937 Act.

Although the Reports of the Departmental Committees referred to in the Acts of 1911 and 1929 were therefore, it is suggested, rightly excluded from those Acts, some more specific phrasing might with advantage have been used. Under the 1911 Act, the Secretary of State was empowered to make regulations to give effect to such of the recommendations of the Departmental Committee as he deemed necessary for the protection of health in cotton cloth factories. Under the 1929 Act he was empowered to make regulations to give effect to the recommendations of the Departmental Committee as contained in their Report; this is little more than a form of legislation by reference. It is suggested that it would have been better to have set out the Committee's reasons for their recommendations in a preamble and after the empowering phrase to have added some such general words as 'to provide adequate ventilation and amenities and generally to protect the health of those working under humid conditions in cotton cloth factories'. This would have facilitated Parliamentary debate on the general issue of the legislative proposal without reference to another document and without clogging the Bill with technicalities which Members could not profitably question.

When dealing with a suggestion put to him by the Committee on Ministers' Powers that the form and matter of regulations should be considered by a Parliamentary body, Sir Arthur Robinson as Secretary to the Ministry of Health said: 'Some of these questions . . . are very technical and you do find that a very great amount of time is required to get a sort of preliminary understanding of the

issues before you really begin to make progress at all. You will find some Members of Parliament who know about these things, but many do not. That is one of the reasons why things take a good deal of time; there is a very long process of exposition to be gone through '.[15] Examples are not difficult to find. When Government interests itself in factory conditions, degrees of humidification must arise; or in coalmines, silicosis must be dealt with[16]; or in merchant shipping, load lines, lighthouses, life-saving appliances and pilotage districts must be regulated.[17] Every hobby is a science today and every subject has its experts. No doubt, as Dr. Allen observes, there have been many technical Acts in the past which were not deemed to need so much delegation; he quotes fifteen statutes between 1833 and 1934 dealing with gas regulations, thirty-two statutes on factory and shop legislation between 1831 and 1937 and other examples.[18] But this question of technicality cannot be divorced from that of time. Members of Parliament are reasonably intelligent individuals and often experts in their own field; but there are many matters which cannot be understood without knowledge of the background to the subject. Probably if Members had the time, they could be made to understand why artificial humidification is forbidden whenever the wet-bulb reading of the hygrometer exceeds $72\frac{1}{2}$ degrees; but they have neither the desire nor the time to learn, and it is difficult to see how the freedom of the subject is imperilled by their ignorance. Dr. Allen quotes the Law of Property Act, 1925, as an example of technicalities in an Act and thereby, it is submitted, gives away the whole of his case.[19] Sir Cecil Carr has said of the property legislation of 1925, 'Surely never were laws so carefully hammered out by experts outside Parliament. How many Members of Parliament seriously perused those Bills or understood them? How long were the clauses threshed out in Committee upstairs?'[20] There are many other examples of Bills and clauses which Parliament is not competent to debate and there seems little reason to rejoice, with Dr. Allen, that these provisions find place in an Act rather than in regulations. To say this is merely to affirm that the functions of Parliament are necessarily limited by its nature. The point has been made most forcibly by Sir Ivor Jennings: 'A popular assembly is not and cannot be a good legislature. Modern legislation dealing with complicated industrial matters or a vast organisation of social services is too technical for private members to contribute much to it. . . . On most subjects there are a few members with technical knowledge; but this is, so to speak, by accident'.[21]

15 *Minutes*, para. 1832; similarly Gwyer, *Minutes*, p. 3 (14).
16 *E.g.*, Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84, s. 47).
17 *E.g.*, Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 427, 444, 653; Pilotage Act, 1913 (2 & 3 Geo. 5, c. 31), s. 7.
18 *Op. cit.*, pp. 124–5.
19 *Ibid.*, p. 125.
20 62 L.Q.R. 64.
21 *Parliament must be reformed* (1941), p. 42.

2. Acts relating to Patent Agents

The history of the second example begins with section 1 of the Patents, Designs and Trade Marks Act, 1888,[22] which provides that after July 1, 1889, no person shall be entitled to describe himself as a patent agent unless he is registered as such in accordance with the Act; and that the Board of Trade shall make such general rules as are in the opinion of the Board required for giving effect to the section.

This power was exercised by the Register of Patent Agents Rules, 1889 (as amended in 1891).[23] Rules 1–4 provide that a register shall be kept by a registrar under the Chartered Institute of Patent Agents of those patent agents registered under the Act and that a copy shall be published at least once a year. Rules 5–6 provide that those who were bona fide practising patent agents before the Act shall submit a statement to this effect and be registered [24] but that, subject to this, an applicant for registration must produce a certificate of the Institute showing that he has passed his final examination in patent law and practice. Rules 7–8 require all intending patent agents, with certain exceptions, to pass a preliminary examination. Rule 9 provides that the Institute shall hold a final examination at least once a year and make regulations for this examination. Rules 10–16 provide that the registrar may erase the name of any person who has ceased to practise or who cannot be traced (details are given of the method to be adopted in tracing) or who fails to pay his annual registration fee or who is convicted of a crime or who, 'after due inquiry, is proved to the satisfaction of the Board of Trade to have been guilty of disgraceful professional misconduct', provided that in the last case the person has received notice of and has had an opportunity of defending himself from any charge brought against him. Rules 17–18 permit the Board of Trade to restore any erased name and, for the purpose of erasing or restoring any name, require the Board to appoint a committee to which shall be referred all cases and whose report shall be conclusive as to facts. Rules 19–25 provide that there may be an appeal to the Board from any order, direction or refusal of the registrar or the Institute and that written notice of the intention to appeal must be given to the Institute and the Board within fourteen days of the order, etc., accompanied by a written statement of the grounds of the appeal. Rule 25 provides that the appeal may be heard by the President, a secretary or assistant secretary of the Board and that the decision given shall be the decision of the Board. Rule 26 refers to the fees set out in the Schedule.

Sections 84–5 of the Patents and Designs Act, 1907,[25] repeat the

[22] 51 & 52 Vict. c. 50.
[23] S.R. & O. Revised 1903, Vol. 9, p. 73 ff., p. 180 ff.
[24] S. 1 (3) of 1888 Act specifically requires this Rule.
[25] 7 Edw. 7, c. 29.

first part of section 1 of the 1888 Act but add that Rules may be made authorising the Comptroller to refuse to recognise as agent any person whose name has been erased from the register or who has, after being heard, been proved to the satisfaction of the Board to have been guilty of such misconduct that his name would have been erased had it been on the register. Section 86 (1) states: 'The Board of Trade may make such general rules and do such things as they think expedient, subject to the provisions of this Act. . . . (g) for regulating the keeping of the register of patent agents under this Act'. The Rules followed in 1908,[26] reproducing the earlier Rules with some alterations which included a power to prescribe preliminary examinations[27] (under the former Rule 8 certain specified examinations were listed in an Appendix).

The Patents and Designs Act, 1919,[28] replaced the provision of the 1907 Act with some additions. This Act was followed by Rules in 1920[29] replacing and substantially repeating the earlier editions. Amongst the additions were requirements for the Institute to hold an intermediate examination and a list of the qualifications required before candidates could sit for the examinations.[30] Rule 21 provided that the Board of Trade might from time to time issue orders regulating the professional conduct of persons whose names were on the register and might delegate the power of enforcing such orders to the Institute subject to appeal to the Board. Rule 28 provided that the Board might on such appeal give such decision or make such order as the case might require. In 1926 small amendments appeared[31] and, in 1932, Rules were made[32] replacing the 1920 Rules. One addition provides that the registrar shall in all cases be entitled to be heard by the Committee of Inquiry which deals with the erasure and restoration of names on the register and the Committee may require the attendance of the complainant or party making the application, and that it shall be the duty of the Institute to present all relevant facts to the Committee. The present law is to be found in the Patents Act, 1949,[33] and the Rules of 1950.[34] The Act differs hardly at all from its predecessor in the amount and detail which it contains. The Rules transfer certain functions, including the right of appeal from an order, direction or refusal of the Institute or the registrar, from the Board to the Comptroller. While the Board is still required to give a hearing to any registered person whom it proposes to suspend or whose name it proposes to erase from the register, the specific requirement that

[26] S.R. & O. 1907 No. 951.
[27] Rule 9.
[28] 9 & 10 Geo. 5, c. 80, s. 18.
[29] S.R. & O. 1919 (1920, No. 145), Vol. 2, p. 191.
[30] Rules 8, 9.
[31] S.R. & O. 1926 No. 58.
[32] S.R. & O. 1932 No. 820.
[33] 12, 13 & 14 Geo. 6, c. 87, ss. 88–9.
[34] S.I. 1950 No. 804.

the Board should establish a Committee whose findings on fact should bind the Board has disappeared.

Here again the question to decide is whether any of these regulations should have been submitted to Parliamentary consideration. It is in the public interest to ensure that those who call themselves patent agents are entitled to do so and are reasonably competent; the process by which they gain their knowledge, and the nature of their relationship to their own Institute and to the Board of Trade are not of general significance. It is suggested that the following matters are of public importance and should therefore have been included in the Act. First, the bare requirement that no person shall be registered as a patent agent until he has passed such examinations as the Board of Trade, on the advice of the Institute, might prescribe. Second, the grounds on which the registrar and the Board have power to erase and restore a name on the register. Third, requirements to ensure that the inquiry preceding any such action shall be conducted in accordance with the principles of justice such as: notice to person accused and his right to be heard; the duty of the Institute to supply the Board with all relevant information; and the detailed procedure governing the right of appeal to the Board.[35] Once these principles have been established, much can be left to the Board to fix by regulations which would include the number, type and standard of examinations, the qualifications required from candidates, the length of apprenticeship before registration, the amount of the fees to be paid, the details of the duties of patent agents to the Institute, and so on. These are matters which can only be decided by patent agents themselves under the Board of Trade and which, moreover, do not concern the general public. There is therefore no value in putting them in a Bill for discussion in Parliament.

The argument that the power to make regulations in such cases as the two just considered should be restricted as much as possible and should be regarded as a necessary evil proceeds from the assumption that Parliamentary consideration is 'democratic' whereas consideration by any other body before decision is not. But in both the examples taken (chosen because in both cases the power delegated was seemingly very great) the interests of those affected are in fact the bases of Government action. Behind the Cotton Cloth Factories Acts lies the examination by the Departmental Committees of employers and employees. Similarly the Institute of Patent Agents submitted its views on the 1888 Bill and many of its recommendations were embodied in that Bill; the Institute was also closely consulted when the Rules made under the Act were proposed and has since that date constantly discussed amendments with the Board of Trade.

[35] As said above, much of this detail previously appeared in the Rules but has now been dropped.

3. The National Insurance Act, 1946 [36]

The comparison between Act and regulations is here limited to the provisions relating to the determination of claims and questions. Section 43, which contains the statutory provisions, does not attempt to construct a skeleton of procedure. Instead it merely indicates the length and position of a few bones. If the reader happens to possess a considerable anatomical knowledge of this type of provision, he may be able to guess what the whole man will look like but the ordinary student is presented with a very curious and incomplete spectacle. The section provides that final decisions of any question arising under or in connection with the Act shall be given by 'the Minister, or by a person or tribunal'. Certain questions relating to children are excluded. Questions relating to right to benefit are not to be determined by the Minister but by an officer appointed by the Minister, with appeal to a local tribunal, with further appeal to the Commissioner (a barrister or advocate of ten years' standing). Certain questions are excluded from this procedure. There may be appeals and references to the High Court on questions of law arising out of decisions made by the Minister. Power may be given to summon persons to attend and give evidence or produce documents; oaths may be administered to witnesses. Little else can be gleaned from the Act. We are left to discover from the regulations [37] the constitution of the tribunals and the rules for exclusion of certain members who have particular interests; the procedure of the tribunals with the exclusion of legal representation, the Press and the public; that the decisions of the tribunals, with the grounds therefor, are to be in writing; that decisions are to be by majority; the limitations on the right of appeal to the Commissioner; the right of the Commissioner to refuse an oral hearing on appeal to him; the right of legal representation before the Commissioner; the principle that any of these bodies may review their decisions in certain circumstances; the effect of such review on the payment of benefits. These are all matters of great importance: of principle, not of detailed technicality. The regulations do of course contain many matters of detail which have been properly excluded from the Act. Moreover, as we have described elsewhere,[38] these regulations were examined in draft by an Advisory Committee. We are not here disputing the excellence of the procedure. We are merely observing that many matters are included in the regulations which ought to have been contained in the Bill and that the provisions of the Act are shapeless and lacking in logical continuity. In this type of case the time to use such Advisory Committees is before the final drafting of the Bill.

[36] 9 & 10 Geo. 6, c. 67.
[37] S.I. 1948, No. 1144.
[38] See article referred to above (p. 289, note 31).

Many of the other regulations which the Committee considered in draft were not of the kind which merited inclusion in the Bill being detailed instructions for implementing the provisions of the Act. But the establishment of administrative tribunals is of this kind. The Bill could have contained the principles of the procedure set out in an ordered form. The National Insurance (Industrial Injuries) Act, 1946,[39] received the Royal Assent six days before the Act we are considering. Sections 42–50 of that Act set out clearly the almost identical procedure for the determination of claims and questions. A comparison of these two pieces of drafting is most instructive. The Industrial Injuries Act shows broadly (some criticism could be made) how to strike the balance between what should go in the Bill and what should be left for the regulations. Nor do the actual provisions of that Act occupy much more space. The drafting procedure of the National Insurance Act in fact involves much duplication since the regulations, to be coherent, have to contain almost everything that has been set out in the Act.

D. Conclusion.

The principal reason for this failure to distinguish between those matters which are of general Parliamentary concern and those which should be left to departmental regulation is not the haphazard nature of the growth of delegated legislation so much as the attitude of the department to the nature of its drafting function. To the Government a Bill is not primarily a document designed to enable Parliament to consider those matters which are its particular concern but a potential Act on which administration will be based. It is for this reason that the meaning and effect of a Bill have generally to be extracted with some difficulty from its clauses and for this reason that explanatory documents are so often necessary. The obscurity and literary ugliness of a statute follow from the fact that its purpose is to give powers to a department or other body and from the necessity of using words and phrases which have in the eyes of the law acquired precise meanings. Further, departments are sometimes reluctant to include in a Bill even those general principles which are to guide new statutory bodies. An example is the provision in the Local Government (Boundary Commission) Act, 1945,[40] where the Minister of Health may, after consultation with local authorities, 'make regulations prescribing general principles by which the Commission are to be guided in the exercise of their functions'. These regulations must be approved by Parliamentary resolution but it is not clear why such consultation could not have preceded the drafting of the Bill and these principles have

[39] 9 & 10 Geo. 6, c. 62.
[40] 8 & 9 Geo. 6, c. 38, s. 1 (3) (now repealed).

been incorporated. The Requisitioned Land and War Works Act, 1945,[41] on the other hand, lays down the principles which are to guide the War Works Commission in considering disputed Ministerial proposals to acquire land or rights.

The problem is not therefore capable of easy solution for it lies in the compromise of two different conceptions of the purpose of legislative material. At the same time, the omission of any important part of the general structure of the proposal in the Bill to be considered by Parliament cannot be justified on the ground that departmental action is thereby made easier. Only three solutions seem possible. The most direct method is to clothe Parliamentary draftsmen with some degree of independence and to lay down certain principles which they must follow in translating the Government's wishes into the form of a Bill; the first principle would be that, in deciding what should go into a Bill and what might be left for Ministerial regulation, the Bill must be regarded as a document to be submitted to Parliament for its consideration and not primarily as the basis for future administrative action; thus the nature and function of Parliament would provide the necessary criterion. The second method, which is supplementary to the first, is that a Parliamentary Committee should examine Bills when introduced to see how far this criterion has been adopted. The third and indirect method is for Parliamentary influence to be continually brought to bear on the Government to ensure that the practice is started of applying this criterion, and that it hardens into a convention.

The main contention advanced in this article is that Parliament must be regarded as a body which has certain functions to perform in the legislative process and that these functions should be determined by its nature and by the time which it has at its disposal. Other arguments based on *a priori* conceptions of sovereignty or on the idea that the Executive is encroaching on the domain of Parliament by taking to itself legislative powers which properly belong to Parliament alone are both historically unsound and unsuited to modern conceptions of the nature of government. Moreover these arguments, by insisting that Parliament should do more than it can and more than it is suited for, impede the necessary adaptation of Parliament to the new developments. Those who advance these arguments would serve their cause better if they insisted on the insertion in Bills of all the principles on which the legislative proposal is founded and on the elimination of much detail which there is no time properly to consider. No one supposes that the distinction between principle and detail can be drawn with exactness. But few general criteria of this kind can be so drawn; this does not prevent their being used nor deprive them of their value. A boundary line is only a narrow area between two large and recognisable fields.

[41] 8 & 9 Geo. 6, c. 43, s. 11.

All this is only half the story. The fact that Parliament cannot examine details or technicalities does not mean that they should go unexamined or that Government departments alone should be responsible for their preparation and implementation. Just as Parliament, a general body, is particularly suited to examine general principles, so there are other bodies having specialised knowledge which can examine details and technicalities. There are many expert advisory bodies both statutory and other; there are the affected interests. We have already referred to their part in the legislative process. What is needed is a far greater extension of their use. This means that Government departments must be prepared to divulge to them far more of the actual draft of the proposal. The reactions of these bodies should be published. Where the consideration takes the form of a continuous series of conferences, agreed reports should be issued. In this way the work of Parliament can be supplemented and there can be assurance that the Government had before it, when making its decision, the advice and criticism which it should receive. By these methods the efficiency of the legislative process can be improved and the increase in governmental activity balanced by an increase in the critical function exercised both by Parliament and by those bodies which have detailed and expert knowledge.

What is needed is a new approach to the whole problem of the ways in which the democratic form of government can adapt itself to the changes in the nature and scope of governmental functions. Parliament, however reformed, cannot alone perform the necessary controlling function. Other democratic methods must be devised and the practice of direct consultation with expert bodies and with affected interests is a valuable development which needs, however, to be extended, enforced and, in some cases, institutionalised. The theory of the Constitution is full of ghosts striving to entangle us with their chains.

J. A. G. Griffith.*

* Lecturer in Administrative Law at the London School of Economics and Political Science.

REFORM OF THE CRIMINAL LAW

WHEN we look back on the early days of the nineteenth century we can smile, perhaps, at some of the quaint things in the legal system of the times—deodand, the formalities of pleading and the assumption that the defendant could not be trusted to speak the truth in his own case. Let us consider, however, some aspects of the criminal law in 1951 to see whether it has now become :

> ' . . . the embodiment
> Of everything that's excellent '

or whether lawyers in 2050 will find as much at which to smile in the system of 1951 as we do in that of 1820.

Considering first the law as to the giving of evidence for the prosecution in criminal cases by spouses against one another, we see at once some anomalies. A wife may testify against her husband if he is charged with smacking some strange child aged sixteen years and eleven months, but not if he is accused of murdering their own son aged seventeen exactly (Children and Young Persons Act, 1933, s. 15). Again, she may give evidence against him if he has wilfully delayed a National Insurance Inspector inquiring into the payment of contributions or if he has failed to pay his contributions (National Insurance Act, 1946, s. 53), but she must not testify against him if he has half-killed a police officer or swindled the Government or her own father of thousands of pounds. Even if her husband is jointly charged with others and her evidence relates only to one of the other defendants, she is still incompetent (*R.* v. *Mount and Metcalfe* (1934) 24 Cr.App.R. 135) and (if called for the Crown) must stand mute—not of malice, not by visitation of God, but by virtue of the wisdom of our legislature. It is submitted that spouses should be competent witnesses against one another either in all or in no criminal proceedings, so that order may be given to this branch of the law of evidence. (Of course, no change is suggested in the law as to their compellability in cases of violence to one another or larceny of each other's goods.)[1]

It may also appear strange what a difference in punishment there can be if certain offences are committed at 8.59 p.m. or at 9.1 p.m. For example, breaking into a dwelling-house after 9 p.m. with intent to commit a felony is punishable with life imprisonment, but if a feloniously minded clock-watcher does it before 9 p.m. he may escape with seven years. Again, entering a dwelling-house (without breaking) in the night can bring a punishment of seven years in gaol if done with intent to commit a felony (Larceny Act, 1916,

[1] See also the Workmen's Compensation (Supplementation) Act, 1951, s. 4 (5).

s. 27 (1)). If the entry is by day, however, no offence is committed if the person is not 'found' in the house; if he is found there, he is liable only to three months' imprisonment under section 4 of the Vagrancy Act, 1824. If he is found by night in a shop or a cinema with intent to commit a felony therein, he may be sentenced to five years' imprisonment (Larceny Act, 1916, s. 28 (4)), but breaking into a cinema or theatre as such by day or being found there is no offence at all under the Larceny Acts. If he is found by day in a shop with like intent (not having broken into it), he seems to commit no offence at all,—however much he may protest his guilt—for the provisions as to being 'found . . . for an unlawful purpose' of section 4 of the Vagrancy Act do not apparently apply to shops. (There are circumstances, however, in which a conviction under the 'suspected person' limb of section 4 might be made as a shop, while open, is a place of public resort (*Sewell* v. *Taylor*, 23 J.P. 792), but the man must have done some act to bring himself within the category of 'suspected person' (*Pyburn* v. *Hudson* [1950] 1 All E.R. 1006) or have a previous conviction (*R.* v. *Fairbairn* [1949] 2 K.B. 690).) The technicalities of 'breaking in' and 'breaking out' are well known to students of the criminal law, but the average man of this or any other century would probably be surprised to know that when he 'leaves a door or window partly open, he gives, as it were, a visible invitation to enter' (Kenny's *Outlines of Criminal Law* (15th ed.), p. 198). It is submitted that the distinctions between day and night, between the various types of building and between what is and what is not 'breaking' are confusing and unnecessary and that the law should be amended by creating one offence only in place of the present 'breaking and entering' and 'being found' provisions, *viz.*, a new offence of entering any building or enclosed yards, garden or area with intent to steal, commit an assault or commit damage or arson. There would, of course, have to be a saving for persons who entered the parts of a place while in use for public resort, such as a shop, with intent to steal, but such persons could no doubt be struck at as 'suspected persons'. Also, magistrates should be enabled to try summarily offences of entering a building if the purpose was only to commit a trivial assault or trivial damage (if such are made offences at all).

Let us turn next to the question of attempts to commit crimes and the punishment for such attempts. Generally, the mind of the criminal who is charged with an attempt must have been equally as wicked as that of one who commits the full offence, and the reasons why the former has not completed the offence will only have been the vigilance of the police and property-owners or (in attempted false pretence cases) the 'sales-resistance' of the latter. Until recently it was thought that an attempt to commit any offence was punishable with only two years' imprisonment unless a statute

laid down a longer term.[2] Parliament has enacted heavy penalties, for example, for attempted buggery and attempting to throw any substance upon the person of the King with intent to alarm His Majesty (Offences Against the Person Act, 1861, s. 62; Treason Act, 1842, s. 2), but one questions if this was 'putting first things first' when attempted house-breaking, larceny and false pretences, for example, were subject only to the penalty for common-law misdemeanour. It has now been decided, however, that the penalty for common-law misdemeanours is not limited to two years' imprisonment but a longer sentence may be given, provided it is not inordinate (*R.* v. *Morris*, 66 T.L.R. (Pt. 2) 1050). An attempt, therefore, seemingly may be punished by a longer term of imprisonment, and there is no more the injustice (if it was an injustice) that the man caught attempting to commit burglary might get a lighter sentence than he could get if the police had arrived two minutes later and found him inside. The decision in *R.* v. *Morris* still leaves anomalies —to take a car without the owner's consent, for example, is punishable on indictment with twelve months' imprisonment, but the attempt to do so may be punished with any term that is not inordinate. (And see 113 J.P.N. 72 as to summary trial of the complete and the attempted offence of this nature.) However, the likelihood of an attempt being punished more severely than the complete crime is small and, so far as offences tried on indictment are concerned, the law as to attempts is not likely to cause any injustice. In summary offences, however, there is the anomaly that an attempt to commit a summary offence is not apparently triable summarily at all (see [1943] Jo.Crim.Law 181), and this means that persons accused of attempting to commit summary offences under the Larceny Act, 1861, or of attempting to commit wilful damage or other summary offences must be sent for trial. Here again one does not suggest that the power to punish the attempt more heavily than the complete offence would be used, but the offender must seemingly undergo the delays and expense of trial at sessions. It is submitted that all attempts to commit offences should be triable in the same courts as the offences themselves, and bring the same punishments as the complete offences (save murder).

The name of Dr. Gallup will perhaps go down to posterity in remembrance of his methods of ascertaining facts about the public and its opinions when the names of twentieth-century worthies and benefactors like Littlewood and Sidney Stanley are utterly forgotten and Sherman is remembered only for *R.* v. *Sherman (H.), Ltd.* ([1949] 2 K.B. 674). Will the twentieth century draw to its close without an investigation of the number of magistrates with personal

[2] Appendix A to Archbold (32nd ed.), for example, gives two years as the maximum term of imprisonment for attempts, though at p. 223 it is stated that there is not at common law any limit for misdemeanour. In *R.* v. *Murray* [1950] 2 All E.R. at p. 928 Goddard C.J., said that the maximum sentence for an attempt was two years' imprisonment but this was before *R.* v. *Morris* (66 T.L.R. (Pt. 2) 1050) was decided.

seals? Forms issued under the Summary Jurisdiction Rules, 1948, require, in most cases, the signature and the seal of the magistrate, and the draftsman is quite right in this because various provisions in the Summary Jurisdiction Act, 1848, require certain forms to be both signed and sealed by the magistrate (see *R.* v. *Tabrum and Quayle, ex p. Dash*, 71 J.P. 325). There is no such statutory requirement in regard to lesser breeds within and without the law, like magistrates' clerks and defendants and their sureties. Nor is there in regard to a summons issued under section 1 of the Act of 1848. It may seem strange, therefore, that in 1911 the ruling of the High Court had to be obtained on the question whether the absence of a seal made a summons bad; it was held by one judge that it did and by another that it did not (*R.* v. *Garret-Pegge and Others, ex p. Brown* [1911] 1 K.B. 880). Such an omission, however, is, anyhow, a defect in form to which no exception can be taken (*ibid.*). Since, however, ' to constitute a sealing neither wax nor wafer nor a piece of paper nor even an impression is necessary ' (*R.* v. *Inhabitants of St. Paul, Covent Garden* (1845) 7 Q.B. 232), so long as some act is done with the intention of sealing, it is difficult to think of a more empty formality than the insertion of a seal on warrants and orders, especially as the number of justices with seals of their own must be very small. The omission of a seal, it is true, would practically never invalidate a document issued in connection with summary jurisdiction, but it might lead to delay while the omission was remedied; it may well seem amazing to the people of the twenty-first century that the absence of a little bit of paper or a printed crown (or sometimes a blob) on a document—seldom noticed even when present—should be a matter that can delay the administration of justice.

Much has been done in the last one hundred years to resolve the distinctions between felonies and misdemeanours—section 35 of the Criminal Justice Act, 1948, for example, extends to jurors being sworn to try a felony the time-saving privilege of swearing all together instead of one at a time. Since so much has been done to assimilate the procedure and do away with other differences, the twenty-first century may feel some surprise that the opportunity was not taken to abolish the distinction altogether. Apart from procedural differences at the trial and the absence of the power to award compensation on conviction for misdemeanour (unless under s. 11 of the Criminal Justice Act, 1948, or by special statutes) as against the power to do so on conviction for felony (Forfeiture Act, 1870, s. 4), the difference in powers of arrest in some cases takes no account of the relative seriousness of the offence. A person who has stolen a milk-bottle may be arrested for it at any time, without warrant; if he has stolen growing fruit, obtained money by false pretences, indecently assaulted an adult, or even wounded someone, the powers of arrest without warrant by the police are more circumscribed. It is unnecessary to set out here the limits of the

police powers as to arrest for misdemeanour, save to observe that once again the law clothes the police with greater powers at 9.1 p.m. than they possess two minutes earlier (Prevention of Offences Act, 1851, s. 11). The offences mentioned above, however, are surely at least as serious as cruelly infuriating animals or attempting to procure a girl to leave the United Kingdom with intent that she may frequent a brothel elsewhere, but Parliament has given a specific power of arrest, without warrant, of persons suspected of these latter offences or of certain others in respect of women whose usual place of abode is not a brothel (Protection of Animals Act, 1911, s. 12; Criminal Law Amendment Act, 1912, s. 1. But see now Criminal Law Amendment Act, 1951). It is submitted that no useful purpose is served by the various distinctions between felony and misdemeanour, and that the only distinction called for by modern criminal law is between indictable and summary offences.

An intelligent lay observer at a trial at assizes would note with approval how, in general, references during the trial to other offences committed by the accused are forbidden. It is right that they should be. Our observer would then note, however, that, after the jury had been sworn in the trial of the next defendants for felony, the crier would make proclamation (with the apparent approval of the judge and counsel on both sides) as follows :

' If any one can inform my lords the King's justices or the King's Attorney-General, on this inquest to be taken between our sovereign lord the King and the prisoners at the bar, of any treason, murder, felony or misdemeanour done or committed by the prisoners at the bar, or any of them, let him come forth and he shall be heard . . .'.

Our observer, being, as stated, an intelligent man, would be entitled to assume that the crier meant what he had just said. Our observer, therefore, might perhaps then come forward into the nearer presence of his lord the King's justice to say that he had been talking to a police officer about the prisoner Jones and had been assured that Jones not only had several previous convictions for dishonesty but also that, if he was acquitted of the present charge, the police had several more pending against him. What a scene of agitation there would then be ! It would be a strong judge who could refuse the defence's request for a fresh jury to be empanelled from people who had not heard what had just been said. Perhaps our observer would be more surprised than ever to hear the crier make exactly the same proclamation in the face of the new jury, despite the events that had happened on the previous proclamation. In America (it is said) trials are delayed by technical objections to jurors, and criminals gain time in this way. No one seems to have thought of holding up an English trial by getting friends of the prisoner to come forward successively with information as to further pending charges until no juror without knowledge of the prisoner's crimes remains in the building. These friends of the prisoner could not, it seems, be prevented from coming forward

at each proclamation with their unwanted list of crimes. They could hardly be found guilty of contempt of court in complying with the directions of the court; if anyone is in contempt, surely it is the police officer who knows of the other pending charges and remains silent.

As is well known, the survivor of a suicide pact is guilty of murder. It is submitted that to class such a person with the poisoner and the violent criminal who kills is both unnecessary and contrary to common sense. There may be cases where a person makes use of a suicide pact to get rid of an unwanted companion and takes good care to survive himself, but the law as to counselling and procuring is quite strong enough to deal adequately with such people without subjecting the wretched survivors of genuine suicide pacts to the ordeal of a death sentence. One may add that an unkind husband married to an unbalanced wife can knowingly and purposely drive her to suicide without the law in fact being able to touch him—aliter if he loves her and looks for a happier life with her in the hereafter but bungles his own suicide while she succeeds. Of course, one remarkable aspect of a suicide pact is that the survivor, having been shown, clearly enough, by the very trial how wrong it is to take one's own life and then having been sentenced to death, will later be granted a pardon conditional on his submitting to life imprisonment. Can he commit suicide at the hand of the hangman by refusing to submit to this condition? So far as one knows, there has not been in England anyone brave enough to refuse to submit to such a condition, so one is left speculating as to whether the Crown would be bound to give effect to his refusal and permit him to commit an act of suicide that would be done rite et solemniter under the authority of the law and by its officers.

Other aspects of the criminal law which by 2050 may have been amended concern the law of manslaughter and the law as to responsibility for a death occurring during the carrying out of a common design.

Firstly, as to manslaughter : It does not require much experience of life to know that the margin between life and death is often a very narrow one. A blow that will kill one man will cause only temporary discomfort to another, and death may occur for all sorts of reasons quite unconnected with the malice behind the blow—the state of deceased's health, the thickness of his skull, whether he falls with his head against grass or stone, and even the treatment he gets in hospital (*R.* v. *Holland* (1841) 2 Mood. & R. 351), but, because death has resulted, one knows that in fact proceedings for manslaughter will probably be taken. It is not suggested that harsh sentences are given for manslaughter, but it is suggested that where death has not resulted from the defendant's negligent conduct the punishment inflicted will seldom be more than a fine (in motor cases and sometimes in personal violence cases) and the proceedings often a prosecution merely for speeding. As with attempts, it is

suggested that the state of the defendant's mind is a safer guide for assessing his culpability than the thickness of the deceased's skull or his agility as a pedestrian, and that the laws as to personal violence, as to explosives, as to dangerous driving and flying, and as to negligence by railway employees, are adequate in the main to protect the public (with, perhaps, an increase in the penalty for dangerous flying). However, some protection of the public is clearly desirable in cases not covered by existing laws, and it is submitted that any conduct of a criminally reckless nature likely to endanger life and limb, and not an offence against any other statute, should be an offence punishable on indictment, whether death results or not. (No change is suggested in the law as to murder, save now as follows.)

It has been well-settled law since the *Sissinghurst-House Case* (1 Hale 462) that if persons combine for a felonious purpose to be effected notwithstanding opposition and one of them kills a man in its execution, it is murder in all who are present whether they actually aid and abet or not, provided that death was caused by an act in the course of endeavours to effect the common purpose. *R.* v. *Betts and Ridley* (144 L. T. 526) is a recent example. Obviously all in the gang must be punished, but is it necessary and, more important, is it just to inflict the punishment of death on all who have combined for the common purpose, 'whether they actually aid and abet or not'? Surely those who do not aid and abet can be adequately punished by a prison sentence.

One wonders what the man in the street thinks of a law that imputes an intent to murder, and imposes the penalty of death on persons who have never had any such intent but are made to answer for the wickedness and folly of a companion. It is appreciated that the Home Secretary would in such cases probably advise a reprieve, but if there is to be an automatic reprieve a reasonable man may ask why the death penalty should be retained at all for those who do not aid and abet.

Lastly, one may ask if the diversity of punishments for larceny is really necessary. The lodger who steals a rug of the value of £4 10s. from his landlady may be sentenced to two years' imprisonment, but if, unhappy Roger, its value is £5 5s., he may get seven years. One would think that it is as grave a matter for a private person to steal the Crown Jewels as to steal a letter in the post, but the imprisonment for the former offence is five years and for the latter life. One may also notice that miners who steal lapis calaminaris, manganese or mundic from the mine are liable only to two years' imprisonment (Larceny Act, 1916, s. 11). The man who steals apples growing on a tree is liable on first conviction to six months' imprisonment, but if he steals the windfalls he is liable to five years (*R.* v. *Friend*, 22 Cr.App.R. 130). If a person has stolen fixtures from a building by ripping them away the prosecution will

fail if he is charged with simple larceny (*R.* v. *Molloy* [1921] 2 K.B. 364).

It is submitted that all offences of larceny, wherever or by whomsoever committed and whatever the nature of the thing stolen, should have the same maximum punishment and that there should be but one offence of larceny. All the provisions as to larceny in ships, in docks, of postal packets, of wills, of controlled articles, by public servants, by lodgers and the rest, should be repealed. The good sense of judges and magistrates can surely be relied upon to distinguish between what is a serious offence and what is not and, where it is desirable in the public interest that certain types of offence should be severely punished, directions of the High Court can bring this to the notice of inferior courts, as was done in the case of frauds on the Post Office Savings Bank.

It may well be that there will be no significant changes in the next century in the methods of ascertaining facts by evidence of witnesses, but perhaps such methods in the year 2550 will have been quite outmoded by advances in the knowledge of telepathy, hypnotism, time, space and the fourth dimension. An offender, charged with piloting a space-ship without reasonable consideration for other users of the stratosphere and summoned to Bow Street Police Court to answer the charge, will find that the chief magistrate's court consists of a room furnished with chairs for the chief magistrate and the offender and with a television set. The magistrate, with his knowledge of the control of time and with his power of ascertaining the past and present thoughts of people, and of projecting (or rather rejecting) himself into the past, will be able to see on his television set the exact circumstances of the case as they occurred on the Heathrow-Mars Rocketway a few days before, and to know what element of recklessness was present in the mind of the offender at the time. Any mental resistance by the offender to the magistrate's attempts to read his mind could speedily be overcome by the use of the court hypnotist. Such a picture, however, presupposes a number of things, including an enlargement of the local jurisdiction of metropolitan magistrates.

Summary of Recommendations

(1) Spouses should be competent witnesses against one another in all or no criminal cases.

(2) It should be an offence (with certain exceptions) to enter any building or enclosed yard, garden or area with intent to commit certain crimes, at any hour of the day, and the law as to breaking into buildings should be repealed.

(3) Attempts should be subject to the same penalties as the completed offence and triable in the same courts.

(4) It should cease to be necessary for any magistrate to purport to seal any document signed by him.

(5) The distinction between felonies and misdemeanours should be abolished.

(6) The proclamation at the start of a felony trial at assizes should be discontinued.

(7) The survivor of a genuine suicide pact should no longer be charged with murder.

(8) A person whose act or omission causes another's death (not being murder) should not be punished more heavily because death has resulted, but any person guilty of criminally reckless conduct likely to endanger life and limb should be punishable, whether or not death or injury results.

(9) Where persons are engaged in a criminal enterprise to be effected notwithstanding opposition and one kills a man but the other in no way aids or abets the killing, the latter should not be deemed guilty of murder.

(10) There should be but one offence of, and one maximum punishment for, larceny, whatever the thing stolen, by whomsoever stolen and whosesoever's property.

G. S. Wilkinson.*

* Clerk to the Dudley Justices.

THE NEGRO AND THE LAW IN THE UNITED STATES

An American travelling outside the United States cannot help but be struck by the vast interest displayed in the position of the Negro in his country. The reason for that interest is not hard to find. 'Our American heritage of freedom and equality has given us prestige among the nations of the world, and a strong feeling of national pride at home. There is much reason for that pride. But pride is no substitute for steady and honest performance, and the record shows that at varying times in American history the gulf between ideals and practice has been wide.'[1] To the non-American, the position of the Negro in the United States indicates that the American ideal of freedom and equality for all men is still far from complete realisation.

For this gap between ideal and reality, American law must take a portion of the blame. It is true that discrimination against the Negro in the United States has roots deeper than the actions of Legislatures and courts. Historical causes reaching far back into North American origins have placed the Negro race in the position of ' second-class ' citizens. ' The Civil War gave the Negro legal equality with his former masters, but it could not and did not give him either the experience in the exercise of freedom or the moral status in the sight of his white fellow citizens to make the freedom of the Negro an acceptable and workable relationship for them.'[2] Discrimination against the Negro is still embedded in the mores of a large part of the United States.

It is, however, inevitable that the law should play a pivotal role in a country whose political and legal institutions are British in origin. This is especially true under the American constitutional system, where the work of the courts is of such significance. Discrimination against the Negro could not have as great an effect without the condonation of the legal order. The consent of the courts has been necessary for the subordinate status of the Negro to become of more than extra-legal consequence.

That the American courts have condoned, if not encouraged, discriminatory practices should not be a source of surprise. It is not unusual for law courts, like other organs of government, to mirror the dominant prejudices of their time. Even a tribunal as far removed from political pressure as the United States Supreme Court cannot help but be swayed by popular sentiment. As was aptly

[1] ' To Secure These Rights ', The Report of the President's Committee on Civil Rights (1947) 9.
[2] Tannenbaum.

pointed out by Lord Bryce, ' The Supreme Court feels the touch of public opinion. . . . Of course, whenever the law is clear, because the words of the Constitution are plain or the cases interpreting them decisive on the point raised, the court must look solely to these words and cases, and cannot permit any other consideration to affect its mind. But when the terms of the Constitution admit of more than one construction, and when previous decisions have left the true construction so far open that the point in question may be deemed new, is a court to be blamed if it prefers the construction which the bulk of the people deem suited to the needs of the time? '.[3]

In so far as the legal position of the American Negro is concerned, the attitude of the Supreme Court has been of cardinal importance. Under the American constitutional system, it has been the court that has determined whether particular discriminatory practices have violated the Thirteenth, Fourteenth and Fifteenth Amendments to the Federal Constitution. Those amendments were adopted after the Civil War to guarantee to the emancipated Negro a full and equal status in American society. The Thirteenth Amendment prohibited slavery and involuntary servitude, except as a punishment for crime. ' But that amendment having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the Fourteenth Amendment, which added greatly to the dignity and glory of American citizenship, and to the security of personal liberty, by declaring that " all persons born or naturalised in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside ", and that " no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws ".'[4] Nor, under the Fifteenth Amendment, could the right of United States citizens to vote be denied or abridged on account of race, colour or previous condition of servitude.

These amendments, said Mr. Justice Harlan, ' if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. . . . Our Constitution is colour-blind, and neither knows nor tolerates classes among citizens '.[5] Yet, as interpreted by the Supreme Court, it is clear that these amendments have not been adequate to place the Negro on a footing of full legal equality with other citizens. The gulf between the letter of the amendments and their practical effect was well expressed by a dissenting member of the court, in a case where the validity of a State segregation statute was at issue : ' We boast

[3] 1 Bryce, *The American Commonwealth* (1889 ed.) 267.
[4] Harlan J., dissenting, in *Plessy* v. *Ferguson*, 163 U.S. 537, 555 (1896).
[5] *Id.* at 555, 559.

of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law '.[6]

A student of the work of the Supreme Court cannot, however, but observe that there has been a profound change in recent years in the attitude of that tribunal toward racial discrimination. ' Distinctions based on colour and ancestry ', asserted a member of the court during the last war, ' are utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war. We cannot close our eyes to the fact that for centuries the Old World has been torn by racial and religious conflicts and has suffered the worst kind of anguish because of inequality of treatment for different groups.' [7] It is, indeed, mostly in its positive approach to the problem of safeguarding the rights of minority groups that the Supreme Court today differs from its predecessors. While most of the work of previous courts had concerned the protection of *property* rights as against what were conceived of as Legislative and executive violations of due process, in the present court the stress has shifted to *personal* rights.[8] If, in 1921, a federal judge could assert ' that of the three fundamental principles which underlie government, and for which government exists, the protection of life, liberty and property, the chief of these is property ',[9] the judicial emphasis today has shifted in favour of the other two.

What Professor Friedmann has termed ' the fundamental changes of legal ideology reflected in the jurisdiction of the Supreme Court of the United States during the past ten years ' [10] have profoundly affected the attitude of the court in cases involving racial discrimination. The approach of the present court in such cases was well stated by Mr. Justice Black in 1944. ' It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may justify the existence of such restrictions; racial antagonism never can.' [11]

The change in attitude of the Supreme Court toward the problem of racial discrimination has been reflected in an improvement of the legal position of the American Negro. That such improvement has in fact occurred will be seen from the remainder of this paper, which will be devoted to a discussion of the present

[6] *Id.* at 562.
[7] Murphy J., concurring, in *Hirabayshi* v. *United States*, 320 U.S. 81, 110 (1943).
[8] See Schwartz, ' The Changing Role of the United States Supreme Court ', 28 Can.Bar Rev. 48 (1950).
[9] *Children's Hospital* v. *Adkins*, 284 Fed. 613, 622 (App.D.C. 1921).
[10] Book Review, 64 L.Q.R. 545, 547 (1948).
[11] *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944).

legal position, derived from recent Supreme Court decisions, with regard to three of the most important manifestations of discrimination against the Negro: *i.e.*, restrictions upon the right to vote, restrictions upon the use of land, and enforced segregation.

That legally condoned discrimination against the Negro exists in the United States is evident to most observers. What is, perhaps, not so apparent even to the informed British observer is the extent to which the legal position has been improving in recent years. It may be that one should not over-emphasise the immediate practical consequences of Supreme Court decisions in a field such as this. At the same time, however, one should beware of minimising their effect, especially from the long-term point of view. One of the things which has made anti-Negro discrimination in the United States of such moment is the fact that it has been sanctioned by the law. With the legal prop removed, the discrimination itself can more easily be eliminated.

Suffrage

Ever since *Ashby* v. *White*,[12] it has been assumed that the right to vote is one of the primary attributes of citizenship. 'The right of voting . . . ', asserted Lord Chief Justice Holt in that case, 'is a thing of the highest importance, and so great a privilege that it is a great injury to deprive the plaintiff of it. . . . It is denying him his English right, and if this action be not allowed, a man may be for ever deprived of it. It is a great privilege to choose such persons, as are to bind a man's life and property by the laws they make.'[13]

In so far as the American Negro is concerned, the suffrage question has been a key one, for, as a disenfranchised minority, the Negro would have little hope of exerting political pressure to bring about an end to discriminatory practices. It was in recognition of the importance of the vote to the emancipated Negro that the Fifteenth Amendment to the Federal Constitution was adopted after the Civil War, prohibiting interferences with the right of United States citizens to vote because of their race, colour, or previous condition of servitude. The constitutional amendment has not, however, of itself, automatically given the Negro the ballot. 'The Southern white people have always viewed the Fifteenth Amendment in much the same way in which patriotic Germans after the [First World War] regarded the harsher provisions of the Versailles Treaty. It was a form of compulsion imposed by victors upon the defeated.'[14] Accordingly, they have resorted to many devices to defeat the intent of the amendment. The Southern attitude is well illustrated in a remark made to Lord Bryce by a leading Southern

[12] 2 Ld. Raym. 938 (1703).
[13] *Id.* at 953, 958.
[14] Cushman, 30 Corn.L.Q. 66 (1944).

politician in 1881 : ' We like the Negro, and we treat him well. We mean to continue doing so. But we vote him '.[15]

It seems clear that the Fifteenth Amendment automatically put an end to all State constitutional and statutory provisions expressly limiting the franchise at general elections to persons of the white race. ' Beyond question, the adoption of the Fifteenth Amendment had the effect, in law, to remove from the State Constitution, or render inoperative, that provision which restricts the right of suffrage to the white race.' But the Southern States have sought to use methods other than those of such express constitutional or statutory discrimination to disenfranchise the Negro. A typical case is *Guinn* v. *United States*,[17] where the validity of the Oklahoma so-called ' grandfather cause ' was at issue. That portion of the State's Constitution provided that anyone who could vote on January 1, 1866, or a descendant of such person, would be able to qualify as a permanent voter without submitting to certain educational tests. Since the date specified was at a time when the Negro could not legally vote, the effect of the provision was clearly to discriminate against the Negro. It was because of this that it was held invalid by the Supreme Court. ' It is true it contains no express words of an exclusion from the standard which it establishes of any person on account of race, colour, or previous condition of servitude prohibited by the Fifteenth Amendment, but the standard itself inherently brings that result into existence since it is based purely on a period of time before the enactment of the Fifteenth Amendment and makes that period the controlling and dominant test of the right of suffrage.' [18] As explained by Mr. Justice Frankfurter in a more recent decision, in so far as voting in a general election is concerned, the ' Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the coloured race although the abstract right to vote may remain unrestricted as to race '.[19]

The prohibition of discrimination in voting in general elections has not, however, of itself, been enough to ensure the effective participation of the Negro in the electoral process. As Lord Bryce pointed out, in discussing American elections : ' There are two stages in an election campaign. The first is to nominate the candidates you desire : the second to carry them at the polls. The first of these is often the more important, because in many [areas] the party majority inclines so decidedly one way . . . , that nomination is in the case of the dominant party equivalent to election '.[20] The best example of an area such as that referred to is the American South,

[15] 2 Bryce, *The American Commonwealth*, 278.
[17] 238 U.S. 347 (1915).
[18] *Id.* at 364.
[19] *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939).
[20] 2 Bryce, *The American Commonwealth*, 69.

which in the main is a solid supporter of the Democratic Party. In the South, for all practical purposes, to bar the Negro from participation in the nomination of Democratic candidates is effectively to preclude his participation in the electoral process.

Since the time when Lord Bryce wrote his study of American government, the primary election has become the general method employed by political parties in the United States to nominate candidates for office. The primary election is held prior to the holding of a general election to enable the voters who are registered as members of a particular party to choose the candidates of that party whose names are to find a place on the ballot at the general election. A primary is thus a 'nominating' as distinguished from an 'electing' election.[21]

In recent years, efforts aimed at disenfranchising the Southern Negro have made use of the so-called 'white primary', by which participation in the primary election of the Democratic Party is limited to white citizens. Since the Democratic primary is the only election of real significance in the Southern States, the device of the white primary has resulted in effective exclusion of the Negro from the process of government in those States. As expressed by the Supreme Court, with regard to a primary election for a Congressman in Louisiana: 'Interference with the right to vote in the Congressional primary in the Second Congressional District for the choice of Democratic candidate for Congress is thus, as a matter of law and in fact, an interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance, since it is at the only stage when such interference could have any practical effect on the ultimate result, the choice of the Congressman to represent the district'.[22]

Does discrimination against the Negro in primary elections come within the prohibition of the Fifteenth Amendment? The answer to this question depends upon whether *State* action is involved in such discrimination, for it is only such State action which is affected by the Fifteenth Amendment and that portion of the Fourteenth Amendment which guarantees to all persons the 'equal protection of the laws'.

In *Nixon* v. *Herndon*,[23] the court dealt with a Texas statute which provided that 'in no event shall a Negro be eligible to participate in a Democratic Party primary election held in the State'. The discrimination against the Negro in this case was clearly caused by the action of the State Legislature, and the statute was consequently held to violate the constitutional prohibition. 'The statute of Texas in the teeth of the prohibitions referred to assumes to forbid Negroes to take part in a primary election the importance of which we have

21 *Strecker* v. *Smith*, 164 P. 2d 192, 193 (Idaho, 1945).
22 *United States* v. *Classic*, 313 U.S. 299, 314 (1941).
23 273 U.S. 536 (1927).

indicated, discriminating against them by the distinction of colour alone.' [24]

None daunted, the Texas Legislature enacted a new statute which gave the State executive committee of a political party the power to prescribe the qualification of its members for voting or other participation. The State executive committee of the Democratic Party then adopted a resolution that white Democrats and none other might participate in the primaries of that party. The court held that this, too, transgressed the constitutional command, for whatever power of exclusion had been exercised by the members of the Democratic executive committee had come to them, ' not as the delegates of the party, but as the delegates of the State '.[25]

The decision in this case was based upon the theory that the Texas statute vested in the executive committee an authority independent of the will of the party as a whole, and that, therefore, its discriminatory acts amounted to State action within the constitutional prohibition. Three weeks after the decision of the court, a State convention of the Democratic Party in Texas adopted a resolution to the effect that in the future only white citizens might vote in the party primaries. A Negro who had been refused a ballot in the Democratic primary brought an action for damages, and the case having been carried to the Supreme Court, that tribunal held in *Grovey* v. *Townsend* [26] that the convention resolution was not State action within the meaning of the Fourteenth and Fifteenth Amendments but was only the action of the political party in exercising its inherent right to determine its own policies and membership. The court thus held that the Democratic Party was in a position similar to that of any ordinary voluntary association, with power to determine the qualifications of its own membership ' and that qualifications thus established are as far aloof from the impact of constitutional restraint as those for membership in a golf club or for admission to a Masonic lodge '.[27] Here the matter seemed to rest, and the Southern States appeared to have found a legally condoned method of precluding the Negro from effectively exercising his right to vote.

Yet it soon became clear that the constitutional guarantee of suffrage was an empty form if it did not extend to participation in primary elections. ' There is not the slightest doubt that the purpose of the " white primary " rule was to disfranchise the Negro. . . . There was something strangely anomalous and unrealistic about a result which, in spite of the Fourteenth and Fifteenth Amendments, left the one agency in the State of Texas which completely dominates the choice of State and federal officials just as free to bar Negroes from participation in that choice as

[24] *Id.* at 541.
[25] *Nixon* v. *Condon*, 286 U.S. 73, 85 (1932).
[26] 295 U.S. 45 (1935).
[27] Cardozo J., in *Nixon* v. *Condon*, 286 U.S. 73, 83 (1932).

though it were a Greek letter fraternity or an association of private business men.' [28]

The Supreme Court itself recognised this in 1944, when it overruled *Grovey* v. *Townsend* in *Smith* v. *Allwright*,[29] which arose on similar facts. The court said in the *Smith Case* that, while the privilege of membership in a political party may be no concern of the State in certain circumstances, when that privilege is made a necessary qualification for voting in a primary to select candidates for a general election, the State makes the action of the party the action of the State. ' The United States ', stated Mr. Justice Reed, ' is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organisation to practise racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.' [30] The court has thus come over to the view that a primary election is a vital part of the machinery of government. ' It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution.' [31]

Smith v. *Allwright* has not definitively put an end to attempts on the part of the Southern States to disenfranchise the Negro. But it seems clear that ever since the court in that case decided that the action of a State convention of the Democratic Party in excluding Negroes from the primary election was State action within the constitutional prohibition against discrimination, the handwriting has been on the wall. The present situation in the South has recently been described as follows: ' A few States continue to tinker with their primary systems with the forlorn hope of producing a sophisticated rather than simple-minded mode of discrimination [32]; others are relying on new forms of registration [33]; and an increasing number, recognising the essentials of democracy, are doing all in their power to follow the rules of the game '.[34] This does not mean that the full franchise for the Negro has become a reality throughout the South. In the past, as ' legal devices for disfranchising the Negro have been held unconstitutional, new methods have been improvised to take their places. Intimidation and the threat of intimidation have always loomed

[28] Cushman, *supra*, note 14, at 67, 71.
[29] 321 U.S. 649 (1944).
[30] *Id.* at 664.
[31] *Id.* at 661.
[32] That their hope is, indeed, a ' forlorn ' one is shown by *Baskin* v. *Brown*, 174 F. 2d 391 (4th Cir. 1949) and *Rice* v. *Elmore*, 165 F. 2d 387 (4th Cir. 1947).
[33] See *Davis* v. *Schnell*, 81 F.Supp. 872 (S.D.Ala. 1949), affd. 336 U.S. 933 (1949).
[34] Bischoff, ' Civil Rights ', *1949 Annual Survey of American Law*, 148.

behind these legal devices to make sure that the desired result is achieved '.[35] Attempts at continuing disenfranchisement are, as has been indicated, still being made. But *Smith* v. *Allwright* has at least forced abandonment of group disenfranchisement of the Negro through the 'white primary' and has opened the door to gradual improvement of the political status of the Southern Negro by ensuring that attempts at disenfranchisement will no longer be legally condoned.

Restrictive Covenants

The doctrine laid down by Lord Cottenham in *Tulk* v. *Moxhay* [36] has in America been used as a means of imposing restrictions on the use of real property by the Negro. 'That this court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed ', asserted the Lord Chancellor in the *Tulk Case*.[37] And he went on to hold that such covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns should use or abstain from using the land in a particular way, would be enforced in equity against all subsequent purchasers with notice, independently of the question whether it was one which ran with the land so as to be binding upon subsequent purchasers at law. 'That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.' [38]

Under Lord Cottenham's doctrine, a court exercising equitable powers will enforce a restriction upon the use of land contained in a contract of sale both against the original covenantor and any subsequent holder of the land taking with notice of the restriction. There is nothing in the doctrine to prevent its employment as a means of restricting the use of real property to members of a specific race, and in the United States, restrictive covenants, which have as their purpose the exclusion of persons of the Negro race from the occupancy of real property, have been widely used.

Attempts at restricting the use of land have, indeed, gone even further in the Southern States. Thus, in *Buchanan* v. *Warley*,[39] there was in issue the provisions of a municipal ordinance which denied to coloured persons the right to occupy houses in blocks

[35] Report of the President's Committee on Civil Rights, 35.
[36] 2 Ph. 774 (1848).
[37] *Id.* at 777.
[38] *Id.* at 778.
[39] 275 U.S. 60 (1917).

in which the greater number of houses were occupied by white persons, and imposed similar restrictions on white persons with respect to blocks in which the greater number of houses were occupied by coloured persons. This type of direct restriction by State authorities—which amounted to governmentally enforced segregation of the races—was stricken down by the Supreme Court as violative of the equal protection clause of the Fourteenth Amendment. 'The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a coloured man to acquire property without State legislation discriminating against him solely because of colour.'[40]

But this did not dispose of the question of the use of restrictive covenants, which under the doctrine of *Tulk* v. *Moxhay* create an equity in the land in favour of the covenantee and his successors which will be enforced by the courts against the covenantor and his successors. For 'the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the State. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful'.[41]

If restrictions against the use of real property by Negroes could be considered as involving merely the action of the individuals concerned, the constitutional prohibition would not be violated. This was the approach of the Supreme Court in *Corrigan* v. *Buckley*,[42] which was decided in 1926. The constitutional prohibitions, said the court there, 'have reference to State action exclusively, and not to any action of private individuals'. . . . 'It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment'. . . . 'It is obvious that none of these Amendments prohibited private individuals from entering into contracts respecting the control and disposition of their own property'.[43]

There is, however, an obvious weakness in the court's holding that such restrictions upon the use of land involve merely individual, not State, action. It is true that the restrictive covenants themselves come into being through the voluntary action of private individuals. Yet they derive their force and effect primarily through the application of the doctrine of *Tulk* v. *Moxhay*, and that doctrine is applied and enforced by organs of the State—by the courts. The sanction behind restrictive covenants is the possibility of injunctive relief if they are violated. The holding of the court in *Corrigan* v. *Buckley* ignores the fact that such covenants are enforced through State action.

[40] *Id.* at 79.
[41] *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948).
[42] 271 U.S. 323 (1926).
[43] *Id.* at 330.

This was seen by the Supreme Court itself, in 1948, in *Shelley* v. *Kraemer*,[44] where the court held that the Fourteenth Amendment forbids the enforcement by State courts of restrictive covenants which have as their purpose the exclusion of persons of designated race or colour from the ownership or occupancy of real property. The petitioners there, who were Negroes, had acquired property in a tract subject to a covenant restricting use or occupancy to persons of the Caucasian race, and respondents, as owners of property subject to the terms of the restrictive agreements, brought suit for injunctive relief in the appropriate State courts.

The opinion of the court in the *Shelley Case* differs from that which had been rendered in *Corrigan* v. *Buckley* in the court's recognition that these cases involve more than the action of merely private individuals. The action of a State court of equity in enforcing a restrictive covenant, said Mr. Chief Justice Vinson, is clearly to be regarded as action of the State within the meaning of the Fourteenth Amendment. 'It has been the consistent ruling of this court that the action of the States to which the Amendment has reference includes action of State courts and State judicial officials.'[45] Under *Buchanan* v. *Warley*, which has been discussed above, restrictions of the sort involved here 'could not be squared with the requirements of the Fourteenth Amendment if imposed by State statute or local ordinance'.[46] Since enforcement by the courts is treated as State action in the same sense in which a statute is, 'we hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the State courts cannot stand'.[47]

Shelley v. *Kraemer* has dealt a death blow to the application of the doctrine of *Tulk* v. *Moxhay* by American courts in cases involving racial restrictive covenants. It is true that Mr. Chief Justice Vinson was careful not to rule upon the validity of the restrictive covenants themselves. The American court did not go as far as did the Ontario High Court in holding such covenants void as against public policy. 'If the common law of treason encompasses the stirring up of hatred between different classes of His Majesty's subjects', asserted Mackay J., speaking for that court, 'the common law of public policy is surely adequate to void the restrictive covenant which is here attacked.'[48] Mr. Chief Justice Vinson, on the contrary, implied that the covenants themselves were not invalid. 'So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would

[44] 334 U.S. 1 (1948).
[45] *Id.* at 18.
[46] *Id.* at 11.
[47] *Id.* at 20.
[48] *Re Drummond Wren* [1945] 4 D.L.R. 674, 679. But compare *Re Noble and Wolfe* [1948] 4 D.L.R. 123, 139.

appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.' [49]

But, in denying the possibility of judicial enforcement, the court has surely removed the ' teeth ' from such restrictive covenants and has taken a most important step toward a breakdown of racial restrictions upon the use of property. At least in so far as the use of land is concerned, *Shelley* v. *Kraemer* indicates that equal protection of the laws will be more than a mere slogan for the American Negro.

Today, indeed, there is more even than the constitutional guaranty which is violated by the enforcement of restrictive covenants. Such enforcement would be an obstacle to the free accomplishment of American policy in the international field. For, ' we have recently pledged ourselves to co-operate with the United Nations to " promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion ". How can this nation be faithful to this international pledge if [covenants] which bar land ownership and occupancy . . . on account of race are permitted to be enforced? '.[50]

Segregation

' Legally enforced segregation has been followed throughout the South since the close of the Reconstruction era. In these States it is generally illegal for Negroes to attend the same schools as whites; attend theatres patronised by whites; visit parks where whites relax; eat, sleep or meet in hotels, restaurants, or public halls frequented by whites. This is only a partial enumeration - legally imposed separation of races has become highly refined. In the eyes of the law, it is also an offence for whites to attend " Negro " schools and similar places. The result has been the familiar system of racial segregation in both public and private institutions which cuts across the daily lives of Southern citizens from the cradle to the grave.' [51]

Perhaps the best known examples of laws providing for such segregation are the so-called ' Jim Crow ' laws, which make it unlawful for any common carrier to transport white and coloured passengers in the same vehicle or the same portion thereof. The result of these laws has been the enforced separation of the races in public conveyances which has become prevalent in the Southern States.

The Fourteenth Amendment to the United States Constitution, as we have seen, forbids a State to deny to any person within its jurisdiction ' the equal protection of the laws '. How can these

[49] 334 U.S. at 13.
[50] Black J., concurring, in *Oyama* v. *California*, 332 U.S. 633, 649 (1948).
[51] Report of the President's Committee on Civil Rights, 79.

'Jim Crow' laws be considered consistent with the constitutional guaranty of equality of legal status?

The Supreme Court has answered this question by asserting that segregation, as such, is not discriminatory. The leading case is *Plessy* v. *Ferguson*,[52] where it was claimed that a Louisiana statute requiring separate railroad accommodations for Negro and white passengers denied equal protection of the laws. Mr. Justice Brown, speaking for the court, in upholding the Act, rejected 'the assumption that the enforced separation of the two races stamps the coloured race with a badge of inferiority. If this be so, it is not by reason of anything found in the Act, but solely because the coloured race chooses to put that construction upon it'.[53] Or, to express it another way, 'laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other'.[54] So long as laws requiring segregation do not establish unequal facilities for the Negro; the court's doctrine holds, there is no unreasonable discrimination and therefore no denial of equal protection under the law.

There was a vigorous dissent by Mr. Justice Harlan, which has been characterised as 'one of the most vigorous and forthright dissenting opinions in Supreme Court history'.[55] In his opinion, he attacked the very basis of the court's decision, *i.e.*, that segregation alone was not discriminatory. 'It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and coloured citizens. But this argument does not meet the difficulty. Everyone knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude coloured people from coaches occupied by, or assigned to, white persons. . . . The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude, wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. . . . The thin disguise of " equal " accommodations for passengers in railroad coaches will not mislead anyone, nor atone for the wrong this day done.'[56]

To the present-day observer, who has, of course, the advantages of half-a-century of hindsight, it would seem that the merits of the case are all with Justice Harlan's dissent. Segregation, such as was legally condoned by the court in the *Plessy Case*, has become the cornerstone of the structure of discrimination against the American Negro.[57] And the court's assertion that segregation of itself does

[52] 163 U.S. 537 (1896).
[53] *Id.* at 551.
[54] *Id.* at 544.
[55] Report of the President's Committee on Civil Rights, 81.
[56] 163 U.S. at 556, 562.
[57] Report of the President's Committee on Civil Rights, 81.

not mean discrimination appears manifestly unsound. 'The core of Mr. Justice Brown's argument is in his assumption that segregation is not a white judgment of coloured inferiority. This would be so palpably preposterous as a statement of fact that we must assume Justice Brown intended it as a legal fiction. The device of holding a despised people separate, whether by confinement of the Jew to the ghetto; by exclusion of the lowest caste in India from the temple; or by the slightly more refined separate [accommodations], is clearly expression of a judgment of inferiority.' [58]

It must, however, be conceded that the court has not yet wholly abandoned the bases of *Plessy* v. *Ferguson*. It was urged to do so in two cases which were decided in 1950 dealing with segregation in educational facilities, but the cases were decided without a ruling on the argument. As stated by Chief Justice Vinson, the court did not need to 'reach petitioner's contention that *Plessy* v. *Ferguson* should be re-examined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation'.[59]

The fact that the Supreme Court has not gone so far as to overrule the *Plessy* decision does not mean that important steps have not been taken towards improving the position of the Negro within the limits of that case. It will be recalled that, in *Plessy* v. *Ferguson*, the court held that segregation of the races did not violate any constitutional prohibition where the laws requiring segregation did not establish unequal facilities. But implicit in this is the doctrine that legally enforced segregation is valid only if the separate facilities provided for the Negro are substantially equal to those provided for members of the white race. If this requirement of equality in facilities is enforced, many of the worst aspects of segregation can be eliminated. In actual practice, the Negro has received far from equal treatment in so far as the separate facilities provided for him have been concerned. If he is brought up to a level of equality—even if segregation as such may still be imposed—a key step forward will have been taken.

The Supreme Court has indicated that this step must be taken if the constitutional requirements are to be met. Its recent decisions have been aimed at ensuring that the separate facilities provided for Negroes are in fact substantially equal to those afforded to whites. Perhaps the best cases to illustrate this are those dealing with educational opportunities where the inferior position of the Negro in the past has been most manifest. The status of the Negro in so far as education is concerned—especially in the field of higher education—has been of cardinal significance. This has been recognised by the Supreme Court in cases involving

[58] 34 Minn.L.Rev. 305 (1950).
[59] *Sweatt* v. *Painter*, 70 Sup.Ct. 848, 851 (1950); *McLaurin* v. *Oklahoma State Regents*, 70 Sup.Ct. 851 (1950).

claims of inequality in educational facilities. ' Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps, the epitome of that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates.' [60]

Nor is the Supreme Court, in dealing with assertions of inequality in educational facilities, bound by formal attempts to comply with the requirement of equality. In a case decided in 1948, the court had held that Negro applicants for a course in legal education must be admitted to the law schools which had heretofore been reserved to whites unless equivalent facilities were provided for them.[61] In the State of Texas, a separate law school for Negroes was, indeed, opened. A first-rate law school cannot, however, come into being full-grown, like Minerva from the head of Jove. The facilities afforded by the newly opened law school for Negroes could not, in actual fact, equal those which were available to white students at the University of Texas.

That the Negro seeking a legal education in Texas was still in reality in a position of inequality, despite the compliance in form with the constitutional requirement, was the basis of the recent decision of the Supreme Court in *Sweatt* v. *Painter*.[62] Comparing the facilities offered by the new law school for Negroes with those available to whites at the University of Texas, Chief Justice Vinson asserted that ' we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialisation, size of the student body, scope of the library, availability of law review, and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close '.[63] Under these circumstances, petitioner in the *Sweatt Case* had been denied a legal education equivalent to that offered to students of other races. ' We hold that the

[60] *McLaurin* v. *Oklahoma State Regents*, 70 Sup.Ct. 851, 853 (1950).
[61] *Sipuel* v. *Board of Regents*, 332 U.S. 631 (1948).
[62] 70 Sup.Ct. 848 (1950).
[63] *Id.* at 850.

Equal Protection Clause of the Fourteenth Amendment requires that petitioner be admitted to the University of Texas Law School.' [64]

It can be asserted that decisions such as that in *Sweatt* v. *Painter* are in reality of little practical effect, for they do not reach the heart of the problem, the feelings of racial prejudice which still exist in the Southern States. 'It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students.' [65] Yet, though the removal of the legal condonation of such restrictions will not necessarily abate individual and group predilections and prejudices, it cannot be denied that there is a vast difference between restrictions imposed by the State which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the State presents no bar.[66] Even though segregation as such may still be legally enforced, *Sweatt* v. *Painter* at least ensures a legal remedy to the Negro where the facilities provided for him are in fact unequal to those provided for others.

One can, indeed, go even further and hope that the strict enforcement of the requirement of equality in facilities will ultimately force an abandonment of most legally required segregation. If equality in facilities is demanded, segregation becomes impracticable. The equality requirement can be met only if the States concerned are able to provide duplicate facilities with regard to all public services. Such duplication, which is wholly unnecessary from the point of view of efficient governmental administration, would impose a well-nigh impossible financial burden. Segregation is tolerable financially only if equality between the races is not required. Decisions such as *Sweatt* v. *Painter* should thus ultimately lead to the ending of most forms of segregation.

Bernard Schwartz.*

[64] *Id.* at 851.
[65] *McLaurin* v. *Oklahoma State Regents*, 70 Sup.Ct. 851, 853 (1950).
[66] Paraphrasing, *id.* at 853–54.

* Assistant Professor of Law, New York University; author of *Law and the Executive in Britain* and *American Administrative Law*.

STATUTES AND STATUTORY INSTRUMENTS

Common Informers Act, 1951

Writing an obituary notice is normally a sad and painful duty but where the subject of the notice is the common informer that duty becomes an extremely pleasant task. Under the present-day predominance of Government sponsored legislation it is not often that a private member is given or, if given, grasps the opportunity to introduce a measure designed to cauterise the law of some poison which has continued unabated over a very long period of its history. The Common Informers Act, 1951, introduced by Mr. Lionel Heald K.C., relegates that breed of litigants, described by Jonathan Swift as a 'detestable race of people' and castigated by Coke as 'viperous vermin', into the store of legal antiquities. Surprisingly, as will be pointed out later, the Act does not purport to abolish common informer actions in their entirety and a fair number of gaps are to be found in the list of enactments under which proceedings for a penalty or forfeiture are in future prohibited. Furthermore, a proviso to section 1 of the Act states that such proceedings may continue to be brought provided no part of the penalty or forfeiture is payable to a common informer. The exact object of this proviso is somewhat obscure since the Act precludes even the Crown from bringing proceedings as a common informer. Violations of the law which formerly left the door open to penal actions are henceforth punishable on summary conviction by a fine not exceeding one hundred pounds—in addition, the defendant incurs any non-pecuniary forfeiture provided for under the earlier legislation.

Examination of the forty-eight statutes enumerated in the Schedule to the Common Informers Act and which, prior to its passing into law, provided for common informer actions reveals little of the history of this form of proceeding. Today it is commonplace to read of public outcries against the activities of the miniature army of Government paid inspectors under whose ægis ministerial regulations are enforced. Yet they are but the natural successors of the mediaeval common informers. In the Middle Ages, when no proper system of securing obedience of the law existed, it was a frequent practice to encourage the enforcement of a new statute by giving any member of the public a right to sue for the monetary penalty imposed by Parliament for a breach of the statute. This method proved highly successful and the number of enactments in

which the legislature resorted to this disreputable process became increasingly large. Some, like the Sale of Wares after the Close of the Fair Act, 1331, and the Universities (Wine Licences) Act, 1743, though long forgotten continued as possible sources of profit to the common informer and are finally abolished under the present Act.

As might be expected such an expedient was open to many abuses, not the least of which were proceedings brought solely for purposes of revenge without any thought of safeguarding the public interest. Another favourite practice was for an offender to get his friends to sue him in order to bar subsequent genuine proceedings—the penalty, when recovered, would then be returned to the law-breaker. This bare-faced abuse was forbidden by a statute passed in 1488 (4 Hen. 7, c. 20), under which a defendant who failed to show that judgment had previously been recovered against him after a trial on the merits was liable to be imprisoned and to pay the full penalty involved.

Legislation in the reign of Elizabeth (18 Eliz. c. 5), endeavoured to restrain another evil practice frequently indulged in, *viz.*, the compounding of proceedings in return for a sum of money. Such compounding, unless by leave of the Court, was made illegal and provision was also made to compel an informer to proceed within one year of the alleged offence. This limited measure of reform was directed principally against the highly privileged class of common informers, created during the Tudor era, who were empowered by the Government to sue for penalties on behalf of the Crown and to engage in unrestricted compounding. For good measure the Government was even prepared to intervene to see that its nominees' profits were not intercepted by other informers. This iniquitous system was finally condemned by the judges in the *Case of the Penal Statutes* (1605), 7 Co.Rep. 370, in which it was resolved that ' if by the industry and diligence of any there accrueth any benefit to His Majesty ' the Crown may reward such a person: but ' that when a statute is made by Parliament for the good of the commonwealth, the King cannot give the penalty, benefit and dispensation of such Act to any subject '. It was further resolved ' that it is inconvenient that the forfeiture upon penal laws . . . should be granted to any before the same be received or vested in His Majesty by due and lawful proceedings; for that in our experience it maketh to the more violent and undue proceedings against the subject, to the scandal of justice and the offence of many '.

It has taken over three hundred years for the truth of those last words to be brought home to Parliament and the need realised of ridding the law of an antiquated form of proceeding that did no credit to our judicial system. The immediate result of the judges' decision in 1605 by no means dealt a death blow to the informer's source of livelihood but it did mark the beginning of a

steady decline in the number of common informers appointed to act on behalf of the Crown. This trend was offset by the inception of a system all too familiar at the present day, *viz.*, the employment of full-time paid officials to see that the law is obeyed. Another interesting feature of the same period was the practice of justices in certain counties (among them Essex and the North Riding of Yorkshire) of appointing a chosen individual to act as their very own common informer whose reward for his efforts consisted in a share in the penalties recovered.

Turning to the present century perhaps the most frequently invoked statute by the common informer is the Sunday Observance Act, 1780, which prohibits, under pain of penalties ranging from £50 to £200, the using of any place for public entertainment, amusement, or debate on a Sunday and to which a charge is made for admission. Partial freedom from the threat of a common informer action was provided by the Sunday Entertainments Act, 1932, which allows local authorities, after assessing public opinion in their districts, to grant licences for the opening of cinemas and musical entertainments on Sundays. It also exempts from the stringent provisions of the 1780 Act public lectures and debates, museums, picture galleries, zoos, aquariums and botanical gardens. Views may, of course, differ as to the present need for laws which were designed originally to enforce rigid Sabbatarianism at the end of the eighteenth century. What has been made clearly manifest in recent times, however, is the odium created in the mind of the ordinary person by the picture of individuals seeking to gain financial reward for their ' public spirit ' in defending the English Sunday. That sense of revulsion was exacerbated by such cases as *Orpen* v. *Haymarket Capitol Ltd.* (1931) 95 J.P. 199 and *Williams* v. *Wright* (1897) 13 T.L.R. 551, to cite only two instances. Thus, in *Orpen's Case*, evidence was given that the plaintiff, a few days before the writ was issued alleging a violation of the Lord's Day Act, as it is sometimes called, had changed her name by deed poll from Offenheim to Orpen in the hope of camouflaging her real intentions in bringing the action. *Williams* v. *Wright* was even more remarkable in that the proceedings, based on the same Act of 1780 which, according to its preamble, is directed against the encouragement of irreligion, were brought by a plaintiff who refused to take the oath when called to give evidence, on the ground that he had no religious belief whatever. Under the old law the Court was not concerned with the plaintiff's motive and no discretion was exercisable by the judge when awarding a penalty recoverable for breach of a penal statute.

As already pointed out there are certain omissions, intentional or otherwise, in the list of statutes under which common informer actions may no longer be brought. For example, there are the House of Commons (Disqualification) Acts of 1782 and 1801 which provide

heavy penalties recoverable by the first person to recover judgment against any individual who sits and votes in the Commons while disqualified. A less notable instance occurs in the Bread Acts of 1822 and 1836 where the award is discretionary, only half of the penalty being recoverable by the informer, the other half going to the relief of the county or borough rate. More recently, the Companies Act, 1948, s. 444 (repeating a similar provision in the earlier Act of 1929) enables the Court, when imposing any fine under the Act, to direct that the whole or any part of such fine be paid as a reward to the person on whose information or at whose suit the fine is recovered.

The provision in any statute for making financial reward, whether discretionary or as of right, to an informer is nothing less than enlisting the motive of private greed to enforce the law. That such a system is objectionable goes without saying. This blot on our law by the continued existence of the common informer procedure is now happily practically abolished, and it should not be forgotten that it is to the assiduousness of a private member that this long overdue measure of reform is due.

J. Ll. J. Edwards.

Leasehold Property (Temporary Provisions) Act, 1951

This Act became law on June 24, 1951. It is, as its title indicates, a temporary expedient to afford interim relief to two classes of tenants, pending the promised enactment of more sweeping and permanent measures of reform in the law of landlord and tenant. Although the Leasehold Committee published its Final Report (Cmd. 7982) in June last year no final decisions appear to have been reached on its recommendations. In the meantime this branch of the law is further embroiled by another piece of temporary but highly complex legislation. It is indeed testimony to the overwhelmingly complicated state to which this branch of law has been reduced that in order to afford relief in two relatively limited classes of case it has proved necessary to produce an Act comprising twenty-one elaborate sections and two schedules extending to twenty pages in the King's printer's copy.

Dwelling-houses.

The first class of tenants which the Act is designed to assist comprises those who occupy dwelling-houses under long terms of years (originally exceeding twenty-one years) and which would, but for the Act, expire within two years next after the commencement of the Act. Such leases are normally granted at a ground rent, so that at the expiry of the term the tenant would not be entitled to claim the protection of the Rent Acts. Provided the tenant or

a member of his family was residing in the house immediately before the date of expiry of the lease the Act automatically extends the term until two years after the commencement of the Act, *i.e.*, until June 24, 1953 (s. 1). A similar extension is also granted to such tenants whose leases have expired *prior* to the commencement of the Act provided they (or a member of their family) have contrived to remain in possession until the commencement of the Act without any new agreement having been made, or in pursuance of a new tenancy or agreement at the old rent, without a premium, and expiring within two years from the commencement of the Act. In this case the tenancy is also deemed to have continued up to the commencement of the Act as well as being extended for two years thereafter (s. 2).

The landlord is entitled to determine the extended tenancy if the tenant assigns the tenancy or sub-lets the whole (s. 3), and the tenant can give a month's notice to determine the tenancy (s. 4).

Much controversy raged during the passage of the Bill as to the extent to which the landlord should be deprived of his right to enforce the covenants of the lease. The Act prevents the forfeiture of the extended tenancy save for non-payment of rent or rates, failure to insure, or user for illegal or immoral purposes. Nor can damages be claimed while the tenancy continues, though the remedy of injunction is preserved and can be claimed in the county court as well as the High Court (s. 5).

The landlord is given a right to enter to carry out essential repairs (s. 6); and there are special provisions for the protection of sub-tenants (s. 7).

Shops.

Part II of the Act provides for the renewal of tenancies of shops. Such renewal is not automatic but application has to be made to the county court. The right to apply is conferred on tenants whose tenancies expire immediately before or within two years after the commencement of the Act (s. 10). The court has power, if in all the circumstances it appears reasonable to do so, to grant an extension not exceeding one year; and if the tenancy thus extended expires within the two years from the commencement of the Act, a further renewal may be granted (s. 12). The rent and terms of the new tenancy are to be such as the court thinks reasonable, disregarding any considerations arising from the personal circumstances of the parties (s. 12 (1)).

In certain cases the power of renewal is excluded, *e.g.*, where there has been a breach of covenant and the court is satisfied that a new tenancy ought not to be granted; or where the landlord has offered reasonable alternative accommodation; or (familiar echo of the Rent Acts) where greater hardship would be caused by granting a new tenancy than by refusing it (s. 12 (3)).

There are also provisions for correlating Part II of the Act with

the Landlord and Tenant Act, 1927 (s. 14). No appeal lies under Part II save by leave of the court.

The Act applies to the Crown apart from special exceptions (see sections 16 (2), 12 (3) (*d*)).

Such then is the bare skeleton of the new Act. That its tortuous provisions will eliminate some cases of hardship is obvious; yet it is equally clear that it will be productive in other instances of fresh injustices to landlords and will certainly create new forms of abuse, such as the exploiting of the fag-ends of leases by tenants or assignees of tenants who have retained occupation of part of the premises. It is melancholy to reflect that every fresh enactment on this topic only seems to render more distant than ever the day when some comprehensive measure may be introduced to rationalise this branch of the law by providing a consistent and intelligible scheme of protection which will hold the scales evenly between landlord and tenant.

DENNIS LLOYD.

INDUSTRIAL DISPUTES ORDER, 1951

THE revocation of the Conditions of Employment and National Arbitration Orders, 1940 to 1950,[1] and their replacement by the Industrial Disputes Order, 1951,[2] is an important event in the development of British labour law. It is the first major piece of labour legislation since the repeal of the Trade Disputes and Trade Union Act, 1927, by the Trade Disputes and Trade Union Act, 1946. While, however, the Act of 1946 was a controversial measure, the Industrial Disputes Order, like the Orders which it revokes, rests upon an understanding between the British Employers' Confederation, the General Council of the Trades Union Congress and the representatives of the nationalised industries.[3] It received a unanimous welcome when it was announced by the Minister of Labour and National Service in the House of Commons, and the spokesman of the Opposition promised that the Order would be given 'a fair wind'.[4] The Order introduces some fundamental changes in the principles of labour law, but the Minister emphasised its provisional character. 'I should think', he said, 'that where we are dealing with a matter affecting the lives of many people, it

[1] S.R. & O. 1940 No. 1305, as amended by S.R. & O. 1941 No. 1884; 1942 Nos. 1073 and 2673; 1944 No. 1437; and S.I. 1950 No. 1309.

[2] S.I. 1951 No. 1376. The Order came into force on August 14. It is subject to 'negative' Parliamentary procedure. It was 'laid' for forty sitting days on August 2, but, since Parliament adjourned that day, it will be subject to a 'prayer' for thirty-nine sitting days after Parliament re-assembles. The Second Schedule contains some transitional provisions.

[3] Statement by the Minister of Labour and National Service in the House of Commons; 490 *Hansard* 3301. The Minister added (col. 3302) 'that if at any time either side wish the Order to be discontinued it will be reviewed immediately'. Like its predecessor, the new Order will have to rest not only on an original but on a continued agreement.

[4] Mr. R. A. Butler, *ibid.*, col. 3302.

would be as well to allow an experimental period, and that, when we have found out what happens, we might change it slightly '. He said this in answer to a suggestion made by a Member that, ' in view of the immense importance of this subject ', this matter should, ' in the long run ' be dealt with by statute, ' from the point of view of a permanent solution '. The Minister pointed out that the Order provided ' flexibility ', but that, ' in a few years ' time, it may well be that we might cover this by permanent legislation '. It is clear that, in view of the fluidity of the economic situation, nothing like ' permanence ' can be expected of any measure designed to deal with collective bargaining and industrial disputes, and that it was the path of wisdom to make continued use of the mechanism of delegated legislation provided by the Supplies and Services Acts.[5]

In one respect, however, the Order marks the end rather than the beginning of an ' experiment ': the attempt to use the machinery of the criminal law for the furtherance of industrial peace has ended in failure. The prohibition of strikes and lockouts connected with trade disputes was useful during the war. After the end of hostilities it was allowed to fall into oblivion.[6] When it was brought to life again with the prosecution of the gas workers in 1950 and of the dock workers in 1951, the collapse of the prosecution in the latter case led to the negotiations which produced the agreement on which the present Order rests. Experience in all non-totalitarian countries has shown that penal sanctions are not conducive to happy industrial relations, no matter whether they rest on the criminal law itself or on contempt proceedings following equitable injunctions. As the former Chairman of the American National War Labor Board said in 1949 in evidence before a Senate Committee: ' Men are not encouraged to be reasonable and to reach an agreed settlement when they are under order of the Court to work for a private employer, whether they want or not '.[7] Had he been speaking about British conditions, he might have added that this observation applies to public employers as well. Article 12 (3) of the Industrial Disputes Order provides that nothing in the Order shall be taken as rendering a person guilty of an offence against the relevant Defence Regulation. The provisions in the revoked Order about the need for reporting a trade dispute to the Minister and the lapse of a three weeks' ' cooling-off ' period as a

[5] *I.e.*, under Regulation 58AA of the Defence (General) Regulations, 1939, as having effect by virtue of the Supplies and Services (Transitional Provisions) Act, 1945, the Supplies and Services (Extended Purposes) Act, 1947, and the Supplies and Services (Defence Purposes) Act, 1951, and continued by S.I. 1950 No. 1769.

[6] See for statistics on the enforcement of the Order during the War: Ministry of Labour and National Service, Report for the Years 1939–1946, Cmd. 7225, p. 282.

[7] Mr. William H. Davis, testifying before the Senate Committee on Labor and Public Welfare, February 7, 1949, 81st Congress, 99th Report, 1st Session, pp. 35–37, quoted Russell A. Smith, *Labor Law, Cases and Materials*, 1950, p. 798.

precondition of the right to strike or to lock out have disappeared.[7a] This step was expressly welcomed by the Opposition. It should be welcomed by all lawyers as the end of a piece of legislation which was in practice unenforceable and, like all law which can be and is being openly flouted, was apt to breed contempt of the law itself.

The end of the penal prohibition of strikes and lockouts does not mean the end of compulsory arbitration. This is continued in a modified form, with a new arbitration body, the Industrial Disputes Tribunal, taking the place of the National Arbitration Tribunal which it closely resembles in constitution and jurisdiction.[8] In one very important respect, however, its jurisdiction is more restricted: the old procedure extended to all 'trade disputes', *i.e.*, to the type of dispute which confers certain privileges in criminal law under the Conspiracy and Protection of Property Act, 1875, and in the law of tort under the Trade Disputes Act, 1906,[9] and which is the subject-matter of statutory voluntary arbitration under the Industrial Courts Act, 1919.[10] A 'trade dispute', it will be remembered, is in this legislation defined as a dispute 'between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour of any person'.[11] The Industrial Disputes Order, however, applies only to 'disputes' as defined in the Order itself, *i.e.*, to 'any dispute between an employer and workmen in the employment of that employer connected with the terms of the employment or with the conditions of labour of any of those workmen', and, by express provision 'does not include a dispute as to the employment or non-employment of any person or as to whether any person should or should not be a member of any trade union'.[12] Lawyers may boggle at the notion of a 'dispute' which is a species of the genus 'trade dispute', but they have to apply the law as they find it and are only permitted to wonder why the draftsman did not use

7a Art. 4 of Order 1305.

8 Compare Order 1305/1940 (as amended), Art. 1 and Schedule, with S.I. 1376/1951, Art. 7 and First Schedule.

9 Section 5 (3) of the latter Act which applies to both Acts.

10 Section 8, with which the definition in Art. 7 of Order 1305 was identical. This definition contains, in contradistinction to that in the Act of 1906, the words 'or difference' which are not without importance in practice, but have been omitted in the new Order 1376/1951.

11 The definition of a 'worker' (or 'workman') in the new Order (Art. 12) is identical with that in Art. 7 of Order 1305 which, in turn, had been taken from that in Section 8 of the Industrial Courts Act, 1919. It differs fundamentally from that in Section 5 of the Trade Disputes Act, 1906. As interpreted by the House of Lords in *National Association of Local Government Officers* v. *Bolton Corporation* [1943] A.C. 166, the definition which has been embodied in the new Order covers everyone who works under a contract of employment. It does not (see below) cover servants of the Crown, and members of fire brigades maintained in pursuance of the Fire Services Act, 1947, are expressly excluded by Art. 12 (2) of the new Order. Otherwise 'workman' means 'employee'.

12 Art. 12 (1).

the obvious expression 'industrial dispute' for the new conception which is the foundation of the whole Order. What is far more important, is the practical implication of this change: all sympathetic disputes are excluded, so are all secondary disputes of the *Quinn* v. *Leathem*[13] or *Lyons* v. *Wilkins*[14] type. More than that: the new procedure does not only not apply to 'recognition' conflicts (this does not, in practice, mean much of a change) or to conflicts about the closed shop, but it also excludes any difference which arises from the engagement, non-engagement, or, most significant, re-engagement of a worker. It is rigidly confined to 'terms of employment' as distinguished from 'conditions of engagement'.[15] This means in effect that the ruling of the King's Bench Divisional Court in *R.* v. *National Arbitration Tribunal, Ex parte Horatio Crowther Ltd.*,[16] has been given statutory force. Here indeed we have an 'experiment': in future the Tribunal can not be invoked in those very critical cases which arise from the refusal of an employer to reinstate a workman after a strike. Not only can it not make a binding order to reinstate (this was the effect of the *Crowther Case*), it has no jurisdiction to deal with the matter at all and cannot even make a recommendation backed by its moral authority. We can only hope that the 'fair wind' under which the ship is to sail will not blow it on to the rocks.

In future, as in the past, the proceedings will begin with a report of the dispute to the Minister. However, there is here again a very important innovation: under the old dispensation the right to report was vested not only in the organisations on both sides, but also in the individual workers and employers who were 'parties to the dispute'.[17] Now, while the individual employer may still report, the individual worker has been deprived of this right.[18] On the workers' side only a trade union has access to the Minister, and through him, to the Tribunal. The details of these provisions about the *locus standi* are very complicated and will be dealt with in a subsequent article, but it is impossible not to express some regret at this 'mediatisation' of the individual. It is all

[13] [1901] A.C. 495.

[14] [1896] 1 Ch. 811; [1899] 1 Ch. 225.

[15] See an article by the present writer in (1943) 6 M.L.R. 112, esp. p. 116.

[16] [1948] 1 K.B. 424. This decision, with which that of the United States Supreme Court in *Phelps Dodge Corporation* v. *National Labor Relations Board* (1941) 313 U.S. 177, might be usefully compared, was much the most important judicial pronouncement on the old Order. By excluding reinstatement disputes from the scope of compulsory awards (while, of course, maintaining the prohibition of strikes in connection with such disputes) this decision made Order 1305 untenable. One can only marvel that it survived the *Crowther* decision for more than three and a half years.

[17] Art. 2 (1) of Order 1305, with which Art. 5 (3) of Order 1305 should be compared: 'questions' (now 'issues') concerning the observance of existing collective agreements could always be reported only by organisations on both sides, but 'disputes' are a very different matter.

[18] Art. 1 of Order 1376/1951. Mr. Robens said in the House (col. 3301) that this had been done with a view to developing and strengthening 'the voluntary system of negotiation' and to upholding 'the sanctity of agreements and awards'.

very well to say that the purpose of the Order is to regulate collective relations, and that nothing should be done to disrupt the unity of trade union action. This is true, but one may doubt whether it was wise for the unions to press for a change in the law which in effect means the removal of a safety valve for internal union pressure and of an outlet for the discontent of trade union minorities. It is no answer to this observation that, even in the past, the Industrial Relations Department of the Ministry did not always look with a very benevolent eye upon reports emanating from opposition groups. There is such a thing as a legislative standard and it is a question of policy whether a monopoly of access to state authorities should be a weapon in the armoury of a union executive in its battle against disgruntled or recalcitrant minorities.

Once a dispute has been reported, the procedure will, save in one important respect, be very similar to that which obtained in the past. The fundamental principle that settlement by the autonomous organs of negotiation and arbitration has absolute priority over statutory machinery of any kind, has not only been kept intact, but has been re-emphasised.[19] The Minister *must* try an autonomous settlement if there is any chance of doing so,[20] while he *may* also try any other 'steps' (such as a reference to the Industrial Court or *ad hoc* arbitrators or conciliation by his own officers under the Conciliation Act, 1896, or a commission of investigation under that Act or a Court of Inquiry under the Industrial Courts Act)[21] rather than a reference to the Industrial Disputes Tribunal, *i.e.*, to compulsory arbitration. Where no reference to autonomous machinery has been possible and the dispute has not been settled otherwise, the Minister *must* refer it to the Tribunal (normally within a fortnight),[22] but where he has referred it to autonomous machinery and the machinery does not produce a settlement, the Minister has only a discretion and not a duty to refer it to compulsory arbitration[23]: generally speaking, industries

[19] Art. 5 and also Art. 6 which has the tendency, as the Minister put it (col. 3301), to exclude 'the possibility of using the machinery as an appeal against an award under the Industrial Courts Act or settlements reached through voluntary machinery'. It provides that these voluntary settlements 'shall for the purposes of this Order be treated as constituting a final settlement of that dispute'. This raises legal problems of truly formidable dimensions which cannot be dealt with here. Government as well as Opposition spokesmen in the House of Commons emphasised the need for preserving the preponderance of voluntary machinery. This is, of course, the fundamental principle of British labour law, and is quite beyond any controversy, political or legal.

[20] Art. 5.—Similarly under Art. 2 (2) of the old Order 1305.

[21] Art. 4. He may do so only where there is no chance of autonomous settlement.—Similarly Art. 2 (3) of the old Order 1305.

[22] Art. 8 (1).—Under the old Order 1305, Art. 2 (4), the time limit was three weeks. This was changed because, under the old Order, 'apparent slowness in the working of the machinery has caused a great deal of frustration and irritation among the people who have to abide by it' (Mr. Robens, col. 3306). Order 1305 was ambiguous ('may' in subs. 3, 'shall' in subs. 4).

[23] Art. 8 (2). Again the old Order was not clear.

with a developed machinery of negotiation and arbitration should, so it seems, not be brought within the scope of compulsory arbitration. This explains the fact, noted by Professor Glanville Williams,[24] that this legislation does not apply to the Crown: the Civil Service Arbitration Tribunal in effect excludes the Industrial Disputes Tribunal.

The great change introduced in the procedure is the vital new Article 8 (3): The Minister *must* postpone the reference to the Tribunal where it appears to him 'that action is being taken by either of the parties to the dispute designed to compel the acceptance of terms or conditions of employment which are the subject of the dispute and resulting in a stoppage of work or a substantial breach of an agreement between the parties' and if in his opinion it would be undesirable to refer the matter to arbitration while such action continues. If the dispute has already been referred to the Tribunal at the beginning of such hostile action, the proceedings must be stayed upon a notification to this effect by the Minister to the Tribunal. It can be easily seen that this provision is to fill the gap opened by the repeal of the penal sanctions. The old law tried to create an inducement to keep the industrial peace by making strikes and lockouts criminal offences. The new law does not prohibit hostile action, but deprives those who resort to it of the benefit of arbitration. Normally there can be no arbitration as long as a stoppage continues, and a party desirous of changing the level of wages or other terms of employment must choose between hostilities and compulsory arbitration. In the writer's opinion this is likely to be a much more powerful instrument of industrial peace than anything hitherto formulated in a statute or statutory instrument.

Arbitration by the Tribunal remains compulsory in both meanings of that term: it remains compulsory as a matter of procedure in that reference of the dispute by the Minister to the Tribunal does not (as in the case of voluntary arbitration under the Act of 1919 by the Industrial Court [25]) presuppose the consent of both parties. It also remains compulsory in the substantive sense: the award becomes a compulsory implied term of the contracts of employment to which it applies, and this with a limited retrospective effect in certain cases.[26] But the sanction is, of course, purely civil and not penal. The law laid down in *Simpson* v. *Kodak* [27] remains as it was: the award binds only those who were parties to the

[24] Crown Proceedings, 1948, p. 83.

[25] Art. 8 (1) of the new Order, contrasted with section 2 (2) of the Industrial Courts Act, 1919.

[26] Art. 10. Compare Art. 2 (5) of Order 1305. There are important differences in detail, more significant from a theoretical than from a practical point of view. The compulsory normative effect is now confined to awards made by the Tribunal itself. See the article mentioned in note [15], pp. 129 ff.

[27] [1948] 2 K.B. 184.

dispute. It is not in the legal sense what the Webbs called a ' common rule '.[28]

Like its predecessor, the new Order deals not only with the settlement of disputes, but also with the observance of those collective agreements which come within the statutory definition of ' recognised terms and conditions '.[29] The changes are here more technical than substantial. The old Order formulated a general obligation of employers to observe recognised terms and conditions,[30] an obligation enforced through the machinery of the Order and through penal sanctions, but not through direct civil sanctions.[31] But as a result of the disappearance of the threat of punishment (which was never enforced) the new Order drops the general ipso jure obligation. What will in future be reported will no longer be a ' question ' whether an employer is observing the terms and conditions, but an ' issue ' whether he should observe them : the Tribunal no longer declares an existing obligation, but it shapes it afresh, it no longer legislates through adjudication, but it exercises a purely creative, constitutive, or legislative function.[32] This has led to a certain modification in the retrospective nature of the award,[33] but otherwise it means little from a practical as distinguished from a jurisprudential point of view, although the Minister, for fairly obvious political reasons,

[28] *Industrial Democracy*, 1926 edition, pp. 560 ff. The expression has, of course, become part of the positive law of the Commonwealth of Australia.

[29] Defined in Art 2 (*a*): Terms and conditions of employment established in any trade or industry or section of trade or industry in any district, which have been settled by machinery of negotiation or arbitration to which the parties are organisations of employers and trade unions representative respectively of substantial proportions of the employers and workers engaged in that trade or industry or section of trade or industry in that district.—With the exception of the reference to sections of a trade or industry, this is identical with the old law: Order 1305, Art. 5 (1).

[30] Order 1305, Art. 5 (1). The obligation was to observe recognised terms and conditions or ' such terms and conditions as are not less favourable '. Since this was a substantive obligation, the law gave an elaborate definition of terms and conditions which in no circumstances could be deemed to be ' less favourable ' (Art. 5 (2)). With the disappearance of the ipso jure obligation this has become unnecessary.

[31] *Hulland* v. *William Sanders and Son* [1945] 1 K.B. 78 (C.A.).

[32] Art. 2 (*b*) and Art. 9. The Tribunal may require the employer (who will usually but not necessarily be a non-federated outsider) to observe the recognised terms and conditions or such terms and conditions ' as may be determined by it to be not less favourable '. The terms imposed by the award become compulsory implied terms of the relevant contracts of employment, in virtue of Art. 10.—See also two articles by the present writer in (1948) 11 M.L.R., p. 269 and p. 429.

[33] Compare Art. 10 of the new Order with Art. 5 (4) and (4A) of the old Order as amended by S.R. & O. 1944 No. 1437. The main difference is that under the old Order, in view of the existence of an ipso jure obligation, the Tribunal was empowered to make the award retrospective to the date on which the employer became aware of his obligation. This subjective criterion of retroactivity (' date of knowledge ') which existed alongside the objective criterion (the date on which the question first arose) has now disappeared. The limit of retroactivity is now again purely objective: the date on which the issue first arose.

gave it some emphasis in explaining the Order in the House.[34] The details will have to be dealt with in a subsequent article.

The provisions in the old Order about the codification of trade practices which were 'spent' have not been resuscitated.[35] The legislation on the restoration of pre-war trade practices is not, of course, affected by the new Order.[36]

O. Kahn-Freund.

[34] 490 *Hansard* 3301.
[35] This was Art. 6 of the old Order.
[36] Restoration of Pre-War Trade Practices Acts, 1942 and 1950.—This note is not intended to be more than a preliminary survey. It is hoped to deal with many details which have been omitted and with the place of the Order within the framework of labour law as a whole in an article in a subsequent issue.

REPORTS OF COMMITTEES

First Report of the Committee on Punishments [1]

The Committee which reported recently upon punishments in prisons and Borstals has produced some interesting and valuable suggestions and has also raised several controversial issues. It has recognised with considerable good sense, the existence of the tobacco ' black market ', run by the ' tobacco barons ', in the prison system and its considerable influence upon the actions of prisoners, who, as is stated in a letter from a prisoner printed as an Appendix, are sometimes forced into committing prison offences in order to avoid the retribution which follows failure to pay debts owing to the ' barons '. The Committee recommends that the earnings of the average prisoner should amount to 2s. 6d. per week; and while it is doubtful if this would be high enough to defeat the ' barons ' entirely, the price of cigarettes being what it is, it should certainly be a help. The recently revised scale of earnings now stands at 1s. 6d. per week on an average, which is certainly inadequate; the matter is, however, dependent upon what the Commissioners can obtain in the way of finance, rather than upon policy decisions.

The Committee has also recommended that Restricted Diet No. 2 (slightly more substantial than No. 1) should be revised for the prison system, and abolished in Borstal altogether, and the Home Secretary recently announced that the revision mentioned was taking place.[2] No. 1 diet is, however, on the Committee's recommendation, to be retained in Borstals, although Mr. Ede advised Governors and Boards of Visitors that it should be used only in exceptional cases and as a last resort. It will be remembered that dietary punishments were suspended in all Borstals in 1948 for an experimental two-year period, and it should be remarked that the Commissioners took no steps to provide any objective and reliable evidence about the result of this experiment, with the result that the Committee was presented with a mass of conflicting opinions about the results; to which their recommendation has added another, which is not particularly convincing, in the view of the writer, since, while it is admittedly based upon a few cases of real difficulty, the Committee's recommendation is of a general and unqualified nature. Indeed, the general attitude of the Committee towards

[1] Report of a Committee to Review Punishments in Prisons, Borstal Institutions, Approved Schools and Remand Homes, Parts I and II, Prisons and Borstal Institutions, H.M.S.O., Cmd. 8256.

[2] See *Hansard* for July 26, 1951, col. 2314, for the Home Secretary's announcement.

discipline is one which might legitimately be described as a ' Visiting Committee view ', namely, that cases of indiscipline must be put down with a firm hand and that ' troublemakers ' must be crushed or removed. In both prisons and Borstals the Committee recommend for this group transfer to a special establishment, which, for Borstals, would closely resemble a prison, and for prisons would merely be another prison; although they do envisage establishments for ' medical ' (*i.e.*, treatable psychiatric) cases.

There are, however, two serious dangers involved in this attitude, both of which could have fatal consequences in the Borstal system. In the first place, it is most essential to keep discipline and punishment in line with the operation of a training system, a term which can certainly be applied to Borstals, and increasingly to the prison service. While the Committee are by no means unaware of this, they do not give the point anything like its full weight. They are, for instance, rightly disturbed by a considerable divergence of opinion between the officers in Borstals, and the housemasters and Governors, the officers complaining that discipline has deteriorated, that officers were discouraged from putting in reports by their superiors, and that reports once put in were sometimes disregarded or suppressed. They do not, however, draw from this the inference that the Commissioners, Governors and housemasters are failing to train their staffs adequately or to explain to them the meaning and objects of training and the overwhelmingly important fact that every misconduct needs to be seen primarily in relation to the individual case, and only secondarily in relation to institutional discipline as a whole, but see it, as a Board of Visitors very possibly would, as a threat to the stability of the institution which must be removed at all costs. Nor does the high proportion of new staff in institutions lead them to advise a *temporary* reversal of the ' policy of leniency ' until the newer staff have been completely trained and absorbed, but a general reversal of this policy—another recommendation which in its unqualified state is much more extreme that the situation warrants. The Committee also seems to be unduly impressed by the unkempt appearance of a few boys at one or two institutions.

The same attitude appears in the recommendation, accepted by Mr. Ede, that Boards of Visitors should now deal with all absconders. The Committee appears to feel that the threat against the maintenance of institution discipline, and the nuisance caused to the public by absconding can be met by ' heavy punishment ', without essentially injuring training programmes. It has always seemed to me to be an odd situation that while everyone agrees that the public has a right to protection against absconders, nobody seems to think that the public also has a right to be informed about the part absconding plays in institutional training. The Commissioners make very little effort to assist Governors in this very difficult form of public relations, and it is not surprising therefore

if the ' absconder absorption capacity ' of the locality is lower than it should be. In any case, the complainants are generally few once an institution becomes well established. The reasons for the rising absconding rate, which the Committee adduces both as an argument for the general tightening up of discipline, and for placing adjudications for this offence in the hands of the Boards of Visitors, are unknown, and the Committee does not seem to be aware that severer punishment is not only a shot in the dark, but a shot in the dark which can be said from previous experience to be unlikely to hit the target. The same may be said of the falling success rate, also used as an argument by the Committee.

The second danger is the possible effect of heavier punishment and tighter discipline upon the staff. The reporting of misconducts, and their automatic punishment has, in any training system, something of the nature of a trap; it always appears that something has been done about the offence, and that progress has been made in dealing with the offender, but although *something* has happened, honour has been satisfied and authority vindicated, so far as the progress of the individual trainee is concerned it is not always very clear exactly *what* has happened. Added to this is the danger of putting an offender in a situation where he must stand up to authority in order to maintain his own self-respect and the commendation of his fellows, and this can only too easily be brought about by bad initial handling of a situation by an officer. Any experienced Borstal officer will tell you that it is the inefficient officer who reports every misconduct, and the inefficient housemaster or Governor who invariably brings a case to ' trial ', and there are few officers who will not understand the reasons for this if they are explained to them. To a staff engaged in *training*, punishment is either something to be used as a deliberate part of the training plan, or the last resort of the defeated. The Committee, with its continual emphasis on ' firmness ' in dealing with troublemakers, seems to be dangerously close to the latter group.

Another point of principle raised is the procedure to be used in adjudications. Here, the Committee is very much in favour of following the procedure of the outside courts; and emphasis upon the need for the prisoner to be fully informed of the charge against him and to have adequate time to prepare his answer is, of course, very necessary. It is, however, on shakier ground over the questions of representation in the more serious prison offences. (Corporal punishment is still allowable in prisons, it will be remembered, and the point is therefore of considerable importance.) The Committee rejects legal representation on the grounds of its possible misuse by some prisoners, and rejects also the ' prisoner's friend ' since neither the Prison Visitors nor the D.P.A.'s are anxious for the job and there appears to be no one to do it. It is possible that better welfare officers might be helpful here when they arrive, but this is not really the main point. The position now seems to be,

and the recommendations on this point have been accepted by the Home Secretary, that the procedure to be employed is to be one specifically adapted to combat between specialists before an impartial judge, while at the same time the specialists are forbidden and the scales are heavily weighted against the prisoner merely by virtue of the fact that he is a prisoner. If impartiality upon the part of the Visiting Committee is to be strictly maintained, it seems quite possible that injustices will occur, and, in any case, the defence will probably not be presented as it should be; if the Committee is acting in an investigatory capacity, then there should surely be second thoughts about procedure. While, in practice, the changes involved may not be considerable, the Report should be rather clearer about the position of the Visiting Committee than it is; and it might very well have recommended some provision for aiding the offender, even if it is not now available.

Committees of this kind are always in some difficulty owing to the fact that they are considering one part of a whole which is really indivisible, and unless they are to take the bull by the horns and greatly exceed their terms of reference, they are likely to have a rather narrow view of their subject. Those who were responsible for this Report were certainly aware of this, as the historical summaries show, but one cannot help feeling that they have failed to encompass as wide a view as one would wish. While their minor recommendations are useful, most of their major recommendations are strongly redolent of the 'Visiting Committee view' of which I have spoken, in which the maintenance of group discipline transcends by far the demands of individualisation of treatment. They are also rather too ready to argue from the particular to the general, and to recommend general and permanent changes to remedy local and transient difficulties. It should, however, be added that their task has not been made easier by the Commissioners' inability to provide information which has some scientific validity; the Appendices containing evidence are far too reminiscent of a student's practical work notebook for one's peace of mind.

A. G. Rose.

Report of the Committee on Intestate Succession

Lord Morton's Committee on the Law of Intestate Succession has now presented its Report (Cmd. 8310). Despite its title, the terms of reference were restricted. They covered only the position of the surviving spouse, and the application of the Inheritance (Family Provision) Act, 1938, to intestacies. The law of intestacy is one of the outstanding instances where changes in the value of money have made changes in the law imperative. The widow's £1,000 has admittedly become inadequate and the further trusts on intestacy

often make a sale of the family house inevitable, although inconvenient, since in few cases can that be appropriated in satisfaction of the widow's rights. To remedy this situation the Committee proposes:—

(1) Where the intestate leaves a spouse, and one or more issue to raise the statutory legacy to the spouse to £5,000, but to lower the rate of interest to 4 per cent., the balance of the estate to be held upon the present trusts;

(2) Where the intestate leaves a spouse, no issue, but one or more parents, that the spouse should receive £20,000 absolutely (instead of the £5,000) and an absolute interest in half the balance of the estate, the other half to be held for the surviving parents absolutely;

(3) Where the intestate leaves a spouse, one or more brothers or sisters of the whole blood (or issue of such who have predeceased the intestate), but no issue or parent, the estate to be divided as in (2) except that the parents' half of the residue goes to the brothers and sisters on the statutory trusts;

(4) Where the intestate leaves a spouse, but no issue, parents, brothers and sisters of the whole blood (or their issue) then the whole to go to the surviving spouse absolutely.

There are certain lesser and consequential proposals. Where the surviving spouse, as in case 1, has a life interest then that spouse (instead of the personal representatives) should have the option of a capital sum in lieu, and where that spouse was living either in a freehold house or a leasehold one (with at least two years to run) which belongs to the estate, then the spouse should have the option of purchasing the house at its market value, the option to be exercised within twelve months from the grant. The Committee recommends that these provisions should be equally applicable to partial and total intestacies and that no distinction should be made between a surviving widow and surviving widower. It recommends that no provision should be made for 'unmarried wives' or their issue. As to the 1938 Act, it is proposed, first to make it clear beyond doubt that the Act applies to partial intestacies, and then to extend it to total intestacies. Finally it should be noticed that, except as to this Act, the proposals do not affect the law where there is no surviving spouse.

These proposals can only be viewed against the figures given in the Report. Thus, with estates between £2,000 and £5,000 a statistical sample of wills recently proved showed that 65 per cent. of testators left the whole, or major part, of their estate to their widow. The corresponding figure for estates under £2,000 being 73 per cent., and 45 per cent. for those over £5,000. There is thus a close relation between the proposals and the dispositions of testators. In considering these figures it should also be noted that estates under £5,000 amount to 87 per cent. of the total number administered in any one year. The statutory legacy of £5,000

to the spouse will therefore in the great majority of cases exhaust the estate and the children will get no direct benefit.

Apart from this correspondence with wills, the advantages of the proposals are their simplicity and the fact that they will avoid in most cases life interests in comparatively small sums. For that reason the absolute interests in all cases except case 1, and the option of a capital sum for the surviving spouse in that case are attractive. Again it is probably reasonable to draw no distinction between a widow and widower and to exclude in case 4 more remote relations, who now may inherit, in favour of the spouse. It is also clear that some increase in the statutory legacy is necessary, but doubt remains as to the amount. The present proposals mean that in 87 per cent. of estates the deceased's children will be dependent on the benevolence of his or her spouse. This presents few dangers where that spouse is the parent of the children, and does not re-marry, but in other cases, which are not rare, it may be less satisfactory. The Committee indeed recognises the risks but despite the attraction of simplicity it is arguable that the proposed provision for the spouse is excessive. The analogy of the dispositions made by testators is some answer, but not a conclusive one. It must be remembered that the testator who leaves his estate to his widow does so knowing the facts, and knowing his widow. In making a universal 'will' the law ignores these factors, and there are good grounds for the law being more cautious than an individual dealing with his own property at his own risk. That is in fact the attitude of the law when it decrees a difference in treatment between the executor chosen by the testator and the administrator chosen for him. Further, it seems probable that most intestates die as such, not because they are satisfied with the provisions the law makes for them but simply because they have never got round to making a will. In making a will for such persons a cautious attitude seems desirable.

In cases 2, 3 and 4, these arguments gain added weight. The percentage of testators who would make the proposed dispositions drops sharply, on the figures given, to 45 per cent. In cases where the bulk of the husband's estate is family property the absolute gift to his widow of £20,000 and half the balance of the estate may well work hardship on the intestate's original family, particularly if he were, for example an eldest son who has died childless. In these cases where the size of the estate is considerable, the interposition of a life interest would not raise difficulties if coupled with a statutory legacy of a sum sufficient to buy a suitable house. For that purpose the £5,000 proposed in case 1 should suffice, and a further substantial life interest would seem preferable to the proposed absolute gifts of £20,000 and half the balance.

To some extent these criticisms are met by the extension of the 1938 Act to total intestacies. It is evident (see para. 46) that the Committee envisages the possibility of the statutory legacy being

reduced in suitable cases. That extension will, however, only operate in favour of children and will not affect cases 2, 3 and 4. Moreover, too large a provision for the widow in the first place may merely multiply the number of applications under the Act by disappointed children. As it stands, of course, the terms of the Act would exclude applications in many cases because of the provision made. Indeed, the proviso to section 1 (1), excluding application where two-thirds of the income of the estate has been given to the spouse, and the only other dependants are children of that spouse, would, if it remains and the proposals are enacted, exclude in most cases any rectification in favour of the children. If, on the other hand, as the Committee proposes, the restrictions on applications are loosened, then the original objection will hold, and the net benefit of the family from the estate may frequently be reduced by the costs of litigation. The Committee does not, however, enter into a detailed examination of the amendments which will be necessary if the Act is to be applied to total intestacies, it is content to say that the Act must be reviewed with care. The principle of the extension of the Act to intestacy is both welcome and sound since it is only in that way that the inevitable harshness of a general rule can be softened. It seems, though, that extension will not involve amendment so much as a radical revision. One has the feeling that the Committee would not regret that, and many would agree.

With the general trend of the Report few will quarrel, and most will agree that some revision of the law is urgent. On questions of amounts there seems to be room for argument; perhaps the Committee's dislike of life interests and liking for simplicity have been carried too far. Those who read the Report will find though that the Committee argues well for its own conclusions and disagreement will arise mainly from a different emphasis on the factors which the Committee itself considered in reaching its conclusions, and that after all is largely a matter of personal feelings and experience.

J. D. B. Mitchell.

RECENT PERIODICAL LITERATURE

(1) *General.* F. K. Beutel: An outline of the nature and the methods of experimental jurisprudence, 51 Col.L.R. 415. G. W. Constable: Natural law jurisprudence and the cleavage of our times, 39 Georgetown L.J. 365. B. Currie: The materials of law study, 3 J.Leg.Educ. 331. B. E. King: Propositions about law, 11 Camb.L.J. 31. R. D. Kollewijn: Conflict of Western and non-Western law, 4 Int.L.Q. 307. M. L. Laserson: The work of Leon Petrazhitskii: inquiry into the psychological aspects of the nature of law, 51 Col.L.R. 59. 26 N.Y.U.L.R. No. 1 is a Frederic William Maitland centenary issue. K. Olivekrona: Realism and idealism: some reflections on the cardinal point in legal philosophy, 26 N.Y.U.L.R. 120. T. F. T. Plucknett: Maitland's view of law and history, 67 L.Q.R. 179. R. Pound: Some comments on law teachers and law teaching, 3 J.Leg.Educ. 519. M. Radin: The goal of law, 1951 Wash.U.L.Q. 1. Mrs. Reynell: Frederic William Maitland: A memoir [by his sister], 11 Camb.L.J. 67. F. Rodell: Justice Holmes and his hecklers, 60 Yale L.J. 620. P. Sayre: An introduction to a philosophy of law, 36 Iowa L.R. 415. C. M. Schmitthoff: The growing ambit of the Common Law, 29 Can.B.R. 469. H. L. Stewart: Canon law, 29 Can.B.R. 483. G. Schwarzenberger: On teaching international law, 4 Int.L.Q. 299.

(2) *Constitutional Law.* F. R. Beasley: Australia's Communist Party Dissolution Act, 29 Can.B.R. 490. L. B. Boudin: The settler within our gates, 26 N.Y.U.L.R. 266. Z. Chafee, Jr.: Federal and State powers under the UN Covenant on human rights, 1951 Wis.L.Rev. 389. S. A. de Smith: The prerogative writs, 11 Camb.L.J. 40. J. D. B. Mitchell: A general theory of public contracts, 63 Jurid.Rev. 60. O. J. Lissitzyn: The legal status of executive agreements on air transportation, 17 J. Air L. and Comm. 436; 18 J. Air L. and Comm. 12. R. Parker: Separation of powers revisited, 49 Mich.L.R. 1009. Sir D. B. Somervell: Acts of attainder, 67 L.Q.R. 306.

(3) *Administrative Law.* C. J. Antieau: The powers of municipal corporations, 16 Missouri L.R. 118. J. D. B. Mitchell: see (2). R. Parker: The Administrative Procedure Act: a study in overestimation, 60 Yale L.J. 581. R. Parker: see (2). B. Schwartz: The substantial evidence rule and the Administrative Procedure Act, 25 Wash.L.R. 135. B. Schwartz: Administrative Courts in France, 29 Can.B.R. 381.

(4) *Law of Property and Succession.* S. J. Bailey: Settled shares in a company—income and capital, 67 L.Q.R. 195. A. E. Evans: Riparian rights in artificial lakes and streams, 16 Missouri L.R. 93. W. Geddes: The nature and operation of building society fines, 15 Conv.(n.s.) 165. G. B. Graham: Mutual wills, 15 Conv.(n.s.) 28. J. D. B. Mitchell: The revocation of testamentary appointments on marriage, 67 L.Q.R. 351. A. W. Scott: Charitable trusts in New York, 26 N.Y.U.L.R. 251. L. A. Sheridan: English and Irish secret trusts, 67 L.Q.R. 314. M. B. Virtue: Restitution from the mentally infirm, 26 N.Y.U.L.R. 132, 291. War claims [a symposium] in 16 Law and Contemporary Problems No. 3. H. P. Warner: Legal protection of the content of radio and television programs, 36 Iowa L.R. 14, 509.

(5) *Law of Contract.* J. D. B. Mitchell: see (2). M. B. Virtue: see (4). War claims: see (4). J. F. Wilson: Recent development in estoppel, 67 L.Q.R. 330.

(6) *Law of Tort.* M. M. Belli: The adequate award, 39 Calif.L.R. 1. F. James, Jr.: The qualities of the reasonable man in negligence cases, 16 Missouri L.R. 1. T. Ellis Lewis: A ramble with *res ipsa loquitur*, 11 Camb. L.J. 74. W. L. Morison: Liability in negligence for false statements, 67 L.Q.R. 212.

(7) *Commercial Law.* S. J. Bailey: see (4). Commercial code: [a symposium on the draft uniform commercial code], 16 Law and Contemporary Problems, Nos. 1 and 2. J. Escarra: Some points of comparison between the Companies Act, 1948, and the French law of companies, 11 Camb.L.J. 15. C. H. Fulda: Food distribution in the United States, the struggle between independents and chains, 99 U. of Penns.L.R. 1051. J. M. Holden: Bills of exchange during the seventeenth century, 67 L.Q.R. 230. O. J. Lissitzyn: see (2). The powers and duties of corporate management, Social Meaning of Legal Concepts, No. 3. S. D. Rose: The right of a businessman to lower the price of his goods, 4 Vanderbilt L.R. 221. J. T. Sneed and K. E. Morrison: Bank collection—a comparative study, 29 Texas L.R. 713. Symposium on the inter-relationship of law and accounting, 36 Iowa L.R. No. 2. War Claims: see (4). D. McC. Wright: Some comments on Dr. Fulda's 'Food distribution, etc.', 37 Virginia L.R. 733. J. P. Faude: Conflict of laws in automobile insurance, 29 Can.B.R. 266. H. E. Yntema: Unification of the laws respecting negotiable instruments, 4 Int.L.Q. 178.

(8) *Industrial Law.* A. Cox: The right to engage in concerted activities, 26 Indiana L.J. 319. D. B. MacCormack: Important aspects of the Common Law basis of the Labor Decision and steps towards the development of a national labor policy, 31 Boston U.L.R. 139, 297. J. Sulkowski: The competence of the International Labour Organization under the United Nations system, 45 Am.J.Int.L. 287. C. W. Summers: Union powers and workers' rights, 49 Mich.L.R. 805. G. W. Taylor: The voluntary arbitration of labor disputes, 49 Mich.L.R. 787. W. S. Tyson: Manpower aspects of the Defense Production Act of 1950, 46 Ill.L.R. 1.

(9) *Evidence.* B. Schwartz: see (3). J. F. Wilson: see (5).

(10) *Civil Procedure.* W. W. Blume and B. J. George, Jr.: Limitations and the federal courts, 49 Mich.L.R. 937. Sir L. L. Cohen: Jurisdiction, practice and procedure of the Court of Appeal, 11 Camb.L.J. 3. D. M. Walker: The theory of relevancy, 63 Jurid.Rev. 1.

(11) *Criminal Law and Procedure.* R. Arens: Vicarious punishment and war crimes prosecution: the Civil War or Alice through the Looking Glass, 1951 Wash.U.L.Q. 62. J. M. van Bemmelen: The 'criminologist': a king without a country? 63 Jurid.Rev. 24. P. D. Brown: The Virginia Juvenile Court Law of 1950, 8 Wash. and Lee L.R. 17. S. Gorove: The problem of 'mental harm' in the genocide convention, 1951 Wash.U.L.R. 174. R. M. Jackson: A note on Broadmoor patients, 11 Camb.L.J. 57.

(12) *Private International Law.* A. A. Ehrenzweig: Alternative actionability in the conflict of laws of enterprise liability: an American comment on *M'Elroy's Case*, 63 Jurid.Rev. 39. I. Seidl-Hohenveldern: Extraterritorial effects of confiscations and expropriations, 49 Mich.L.R. 851. War claims: see (4). R. D. Kollewijn: see (1). J. P. Faude: see (7). G. A. van Hecke: Confiscation, expropriation and the conflict of laws, 4 Int.L.Q. 345. E. Spiro: Resulting change of legitimate minor's domicil, 4 Int.L.Q. 192. F. Morgenstern: Recognition and enforcement of foreign legislative, administrative and judicial acts which are contrary to international law, 4 Int.L.Q. 326.

(13) *International Law.* S. W. Boggs: Delimitation of seaward areas under national jurisdiction, 45 Am.J.Int.L. 240. Z. Chafee Jr.: see (2). S. Gorove: see (11). H. Kelsen: Is the North Atlantic Treaty in conformity with the Charter of the United Nations? 19 U. of Kansas City L.R. 1. K. v. Laun: The legal status of Germany, 45 Am.J.Int.L. 267. F. Morgenstern: Diplomatic asylum, 67 L.Q.R. 362. J. Sulkowski: see (8). War claims: see (4). R. Young: The legal status of submarine areas beneath the High Seas, 45 Am.J.Int.L. 225. G. Schwarzenberger: see (1). Aristeides: The Chinese aircraft in Hong Kong, 4 Int.L.Q. 11. D. H. N. Johnson: Artificial Islands, 4 Int.L.Q. 203. F. Morgenstern: see (12).

W. A. Steiner.

NOTES OF CASES

Mistake in Criminal Law

Enthusiasm would hardly go too far if one said that *Wilson* v. *Inyang* [1951] 2 All E.R. 237 is the most important contribution ever made to criminal jurisprudence by an English Divisional Court. For the first time an English court repudiates in general terms the hoary error that a mistake to afford a defence to a criminal charge must be reasonable.

The error goes back at least to the dissenting judgment of Brett J. in *Prince*, 2 C.C.R. at 169-70, and the judgments in *Tolson*, 23 Q.B.D. at 181, 188, 193. It was only Wills J. in *Tolson* who required in all cases a 'tainted mind'. The remarks of the other majority judges, who required the mistake to be reasonable, were casually expressed and were obiter. In fact they were inconsistent with the main decision, which was that bigamy requires mens rea; if it does, a mistake negativing the mens rea must negative the crime, whether the mistake is reasonable or not.

At least two things helped to perpetuate the error. (1) According to some decisions manslaughter can be committed by gross inadvertent negligence, and here mistake is obviously no defence if it is grossly negligent or 'unreasonable'. It is only in crimes of negligence, however, that reasonableness is relevant in this way. (2) Reasonableness goes to prove the genuineness of the mistake, and it is easy to confuse the evidence with the fact. As Lord Bramwell said in another connection: 'I think, with all respect, that in all the judgments there is, I must say it, a confusion of unreasonableness of belief as evidence of dishonesty, and unreasonableness of belief as of itself a ground of action' (*Derry* v. *Peek* (1889) 14 App.Cas. at 352).

In *Wilson* v. *Inyang*, above, a case under the Medical Act, it was held that a person could not be convicted of wilfully and falsely using the title of 'physician' when he believed, albeit unreasonably, that he was within his rights in acting as he did. In part the decision followed *Younghusband* v. *Luftig* (*ante*, vol. 13, p. 236), but the difficulty was that Lord Goddard C.J. in the latter case had said: 'He must, of course, have a reasonable ground for his belief'. Lord Goddard now recanted and explained that he had meant only that the belief must be honest, and that reasonableness was evidence of honesty. In exceptional cases, the court may be satisfied of the existence of an unreasonable belief.

While the decision gives great satisfaction, it shows how unsuitable is the criminal law for determining the proper designations of unregistered practitioners. The criminal law is apt for

checking the fraudulent quack, but not for deciding how an unusual qualification should properly be represented to the public. What is to happen if, when an unregistered practitioner has been prosecuted for using a misleading title and acquitted on the ground of honest belief, he goes on using the title? The question was partially considered in *Younghusband* v. *Luftig*, above. It will be remembered that in that case a doctor of medicine of Berlin University practised in England using the letters 'M.D.BLN.'. On a charge under the Medical Act, the justices acquitted, and their decision was affirmed on appeal. There appear to have been two grounds for the decision. (1) The justices found that 'M.D.BLN.' did not imply that the defendant was registered, and the Divisional Court refused to interfere with this ruling, though it pointed out that the justices might have decided the question the other way. Having regard to this ruling, there was no actus reus. (2) It was apparently held as an independent ground that even if there were an actus reus (taking the view that 'M.D.BLN.' implied registration, the letters 'BLN.' being unintelligible), there was not the statutory mens rea. The second point is now confirmed by *Wilson* v. *Inyang*. Having regard to the first ruling, it is difficult to see why the Divisional Court added the warning to its judgment that if Luftig continued to abbreviate 'Berlin' to 'BLN.' he might well incur penalties in the future. It may be thought that the justices' ruling should estop the Crown as against Luftig from contending in the future that his act was an offence against the statute. In *Wilson* v. *Inyang* this trouble did not arise, because the decision proceeded entirely on absence of mens rea, it being held that the actus reus was committed; consequently when the court warned the defendant not to continue using his description of 'naturopath physician', it could perhaps be said that the warning was justified because on any future charge the defendant would have mens rea. However, it is obviously unsatisfactory that a person who in good faith is using a misleading title can only be stopped by two prosecutions, the first of which is bound to fail. What is needed is not a prosecution at all, which is quite inappropriate, but a civil action for an injunction. If the General Medical Council has no power to sue for such an injunction under the law as it stands, it ought to be given such a power in the next Medical Act.

Glanville Williams.

Malice in Criminal Law

Delivering judgment in the criminal case of *Goodway* v. *Becher* [1951] 2 All E.R. 349, which concerned the malicious shooting of a dog, Lord Goddard C.J. observed that there is no branch of the common law which requires more urgent amendment than the law relating to animals. Four months later the Lord Chancellor

announced the setting up of a committee, with the Lord Chief Justice as its chairman, to consider the law of civil liability for damage done by animals and to make recommendations. Almost with resignation one is led to reflect upon the rarity with which the wheels of reform are so expeditiously set in motion. Or may it not be that the two events are purely coincidental, since the committee's terms of reference expressly exclude the law relating to criminal liability for injuries done to animals, which presumably was uppermost in the mind of Lord Goddard when making the above observation?

This restriction on the committee's field of investigation is regrettable, and all the more so since the Divisional Court in *Goodway* v. *Becher* failed to adopt the bold and radical course which it rightly followed in *Wilson* v. *Inyang* [1951] 2 All E.R. 237. (See Professor Glanville Williams' note on this case at pp. 485 6.) Presented with the opportunity to rectify its earlier lamentable decision in *Gott* v. *Measures* [1948] 1 K.B. 234, the court instead sought refuge in a recent decision of the Court of Appeal in a civil case which, it is suggested, only partly repairs the injustice done in *Gott* v. *Measures*. Since both cases turned on section 41 of the Malicious Damage Act, 1861, it is particularly unfortunate that the earlier authority was apparently not even cited to the Divisional Court who may, therefore, plead that they were not given the opportunity to reconsider the decision in *Gott* v. *Measures*.

If we examine the facts in the two cases it will be seen that there is little essential difference between them. In *Gott* v. *Measures* a black Labrador bitch was killed by the defendant while it was chasing game on land over which the defendant had full sporting rights. The owner of the dog had been warned on several occasions about its depredations, and in shooting it the defendant honestly believed that he was acting in defence of his property. The Divisional Court held that insomuch as the defendant could have no property in live wild game his claim of right was based on a right which the law did not recognise and, therefore, could not be said to be an honest and bona fide claim.[1] Consequently his killing was malicious within the meaning of section 41. In *Goodway* v. *Becher* the offending dog, a black mongrel bitch, had been seen on successive days worrying the defendant's fowls, and its owner had been warned that the dog would be shot if seen repeating its attacks. The following day the bitch was again caught in the act of chasing the defendant's fowls, and the defendant shot and killed it. On these facts the court held that since the defendant's conduct was reasonable—though Cassels J. refers (at p. 351) to the justices' finding that the defendant's behaviour was unreasonable—he could

1 This argument is criticised in the 10th ed. of *Russell on Crime*, by Mr. J. W. C. Turner, at pp. 1662–1665 and by the present writer in *Current Legal Problems 1951*, Vol. 4, pp. 267–269.

not be said to have acted maliciously, and accordingly the conviction was quashed.

The minor importance of *Goodway* v. *Becher* lies in the retreat of the Lord Chief Justice from the rule enunciated in *Gott* v. *Measures* where he said (at p. 239): 'The law, in my opinion, is clear. A person may be justified in shooting a dog if he honestly believes that it is necessary as being *the only way* in which he can protect his property. For example, if a farmer finds a dog chasing his sheep which may result in incalculable damage, and *the only way* in which he can protect his flock is by shooting the dog, he would be justified in doing so'. Approval was given also to the decision in *Miles* v. *Hutchings* [1903] 2 K.B. 714, in which it was stated that the defence of a bona fide claim of right would not apply if the accused knew that much less violent measures than those adopted would attain his object. Having regard to such unequivocal statements of the law by the Divisional Court it is not surprising to find that the justices in *Goodway* v. *Becher*, being of the opinion that while the defendant acted under considerable provocation he had not exhausted every practicable means of stopping the dog from attacking his fowls, convicted the defendant. To say of the magistrates' decision, as Lord Goddard did (at p. 350), that they approached the case from a wrong point of view is, in effect, an admission that the court was itself wrong in *Gott* v. *Measures*. In the present case the Lord Chief Justice adopted the language of Scott L.J. in *Cresswell* v. *Sirl* [1948] 1 K.B. 241 at p. 249, requiring proof only that 'the defendant, having regard to all the circumstances in which he found himself, acted reasonably in regarding the shooting as necessary for the protection of the animals against attack or renewed attack'.

It is to the broader aspect of *Goodway* v. *Becher*, however, that attention must be principally directed. Involved in both cases, *Gott* v. *Measures* and *Goodway* v. *Becher*, is the simple but vital question whether a defendant's claim not to have acted maliciously is to be judged by an objective or by a subjective standard. If the test is objective, to establish a defence on the grounds that he honestly believed he was entitled to do what he did the defendant must show that both his belief and conduct were reasonable. This, it would appear, is the prevailing view of the Divisional Court—at any rate where the mens rea involved is that of malice. If, on the contrary, the test is subjective it follows that the reasonableness of the defendant's behaviour ceases to be a decisive condition and, instead, becomes only one of many factors to be taken into account by the court when considering whether the accused acted bona fide and without malice.[2] Which of these alternative tests is the correct one? When answering that question it must be pointed out that in *Wilson* v. *Inyang*, where the offence charged under the Medical Act,

[2] For a discussion of the cases involving statutory malice in which the court applied the subjective test see *Current Legal Problems 1951*, Vol. 4, pp. 265–267.

1858, s. 40, requires proof of mens rea in the form of ' wilfully and falsely ', the Divisional Court recognised the subjective test as being the criterion for establishing a defence of honest belief. Unless, therefore, the court is prepared to withdraw from this new but altogether welcome attitude towards the reasonableness of the defendant's behaviour there exists an obvious conflict of principle according to whether the mens rea involved is that of wilfulness or, alternatively, malice. Such a position is ludicrous and cannot be allowed to continue. It is suggested that whenever a crime requires proof of mens rea admitting of the possibility of a defence of mistaken but honest belief, the lead given by the decision in *Wilson* v. *Inyang* should be followed and the validity of such a defence determined by reference to a subjective standard.

J. Ll. J. Edwards.

Arrest

The main conclusion from *Tims* v. *John Lewis and Co., Ltd.* [1951] 1 All E.R. 814, is that the subtleties of the law of arrest are not properly appreciated by store detectives. The detectives in this case, having arrested the plaintiff for shoplifting after she had left the shop, took her back to the shop for an inquiry by the manager. It was held by the Court of Appeal that this detention was illegal, because the rule is that a person arrested must be taken before a magistrate or police officer as soon as is reasonably possible.

While the decision was compelled by authority, the result is to lay one more trap for the unwary arrester, which can easily be circumvented by those who are versed in the law. What the detectives should have done was to ask the suspect whether she consented to accompany them to the manager's office while inquiries were made. If she agreed, the question of arrest could have been deferred until after the interview with the manager. If she refused, the detectives would have had to arrest her and take her forthwith to the police. Would it not be more convenient if the rule were that a person arrested may be detained for a reasonable time for inquiries if he does not insist upon being taken before a peace officer forthwith? Most people who are arrested would prefer an effort at investigation to be made, with the chance of being liberated, than to be taken at once before a magistrate.

In one respect the Court of Appeal relaxed the previous rule. In the earlier cases the rule stated was that the person arrested had to be brought before a magistrate. Lord Goddard C.J. (with whom the other members concurred) expressed the opinion that now that the police can grant bail on an arrest without warrant, it is sufficient to take the suspect to them. The reason applies only to an arrest without warrant, and only where it is not displaced by statute. If the arrest (though without warrant) is under a statute that requires

the person arrested to be taken before a magistrate, he must be so taken (*Curran* (1828) 3 Car. & P. 397), and it appears insufficient to take him before a police officer. Here again a person who has not the law at his finger tips is liable to make a mistake.

Where the arrest without warrant is by a policeman, he may apparently take the suspect before a superintendent or inspector of police (or other officer in charge) in the same way as where the arrest is by a private person. But if this superintendent or inspector refuses bail, it seems that the duty to take the suspect before a magistrate again becomes operative. In this respect the Criminal Justice Act, 1914, s. 22, which imposes the duty to grant bail if the suspect cannot be brought before a court of summary jurisdiction within twenty-four hours, is capable of misleading, for in law the suspect must be brought before a magistrate as soon as possible, not merely within twenty-four hours.

In the United States the absurd consequence is drawn that the policeman must bring the accused before the magistrate even though (owing to inquiries after the arrest) he is convinced of his innocence : Orfield, *Criminal Procedure from Arrest to Appeal*, 34–6. This is clearly not the law in England: see *per* Scott L.J. in *Leachinsky* v. *Christie* [1946] K.B. at 135.

A subsidiary question in *Tims' Case* was whether there must be communication of the ground of arrest to a person who is deaf. It was held that there is no absolute duty to communicate in such circumstances.

Glanville Williams.

Solicitors—Professional Misconduct

At a time when the Lloyd-Jacob's Committee and the Monopolies Commission have declared that collective retail price maintenance is contrary to the public interest and when the Government have announced their intention of introducing legislation to ban retail price maintenance altogether, it seems strange that a member of the legal profession should be fined for professional misconduct for charging too little. Yet this, in effect, is almost what occurred in *Re a Solicitor* [1951] 2 All E.R. 108. The facts were that a Trade Union, which advanced money on mortgage to those of its members who wished to buy houses, had an arrangement with a solicitor whereby he was to act for both purchaser and mortgagee. The Solicitors' Remuneration Order provides that in such a case the solicitor is entitled to charge only a total of $1\frac{1}{2}$ times the normal scale for the dual transaction (r. 6). This reduction is, of course, in recognition of the fact that the solicitor acting for both parties will investigate title only once. In fact the practice of the solicitor was to charge the Union full scale, and to make only a nominal charge to the purchaser commensurate with the

additional work undertaken because he was also acting on his behalf. For this he was brought before the Disciplinary Committee and fined £100 (and costs) for attracting business unfairly (Solicitors Practice Rules, rule 1) and for allowing himself to be held out as prepared to do business at less than 2/3rds of the prescribed scale (*ibid.*, Rule 2A). His appeal to a Divisional Court was dismissed.

To say, therefore, that the solicitor was fined for charging too little is not technically correct; this by itself is still not an offence. The Remuneration Order merely lays down maximum charges—there is no prescribed minimum. This, it must be said, does not seem to have been clearly understood by the Divisional Court, for Lord Goddard said (at p. 111): 'It follows that any solicitor who has been doing this work on behalf of both mortgagee and purchaser is entitled to the scale and a half. If a solicitor charges something very much less, he is doing just what the rules were intended to prevent'. In fact this was far from being their intention, which was simply to prevent his charging *more* than scale and a half. An attempt to introduce prescribed *minimum* scales was withdrawn from the Solicitors Bill of 1940 in the face of Parliamentary opposition, but the Disciplinary Committee and the Court have come close to effecting what Parliament expressly rejected.

Lord Goddard's judgment seems to reveal another fundamental misconception as to the nature of solicitors' charges. He was obviously impressed with the undoubted fact that in investigating title the solicitor owed responsibilities to both mortgagee and purchaser. But unfortunately solicitors have never been entitled to charge in accordance with the weight of responsibility which they bear; that is a principle for which the profession and the Law Society have long contended—but as yet in vain.

Nevertheless, attracting business by under-cutting may obviously be unprofessional as the Practice Rules expressly (and very properly) provide. But how can it be said that business was unfairly attracted in this case? The solicitor was entitled, and indeed bound, to charge less than any other solicitor not acting for the mortgagee. Any purchaser wishing to save money would therefore inevitably be attracted to him. Once this attraction had taken place it was a matter of complete indifference to the rest of the profession whether the solicitor charged £40 or £4.

Moreover, it is difficult to see how, even in a technical sense, the solicitor had infringed Practice Rule 2A. As we have seen, this prohibits holding oneself out as willing to accept business at less than 2/3rds of the prescribed scale. In this case the prescribed scale for the dual transaction was $1\frac{1}{2}$ the normal scale and in fact the solicitor had charged more than 2/3rds of this; 2/3rds × 3/2nds = 1, and he had charged 1 plus. He was only brought within the scope of the rule by splitting up the dual transaction into its component parts and regarding each separately, and even so it seems that he could, without offence, have reached the same result by

a different method. If, for example, he had made a special agreement with the Union whereby he charged it only a nominal fee and the purchaser full scale (or 2/3rds of it) his conduct would apparently have been unobjectionable, for the Court quoted with evident approval a ruling of the Law Society that a retained solicitor may agree to do work for his client at a special reduced fee. But the net result would have been exactly the same in the normal case where the mortgagor is liable for the mortgagee's legal charges. Nor, apparently, would he have offended if the Union had arranged to pay the purchaser's legal charges subject to the purchaser making a nominal contribution to it; in such a case he would apparently have been entitled to charge anything between full scale and scale and a half—or indeed even less since once again he would merely have been making a reduction to his original client. Here the net result would have been identical with that reached under the practice actually adopted. Nor, it seems, would there have been any offence if the solicitor had agreed to make no charge at all against the purchaser. It has never been suggested that a Poor Man's Lawyer commits an offence, notwithstanding that he holds himself out as prepared to do for nothing work which might otherwise go to other solicitors; presumably unpaid work is not regarded as " business " notwithstanding that the P.M.L. owes his applicants the normal professional duty of care.[1] Such distinctions may be good law but they are hardly good sense; nor does it seem good sense to base a conviction of professional misconduct on such flimsy grounds.

But, technicalities apart, the decision seems profoundly disturbing. A learned member of the Bar has gone so far as to describe it as " trade unionism at its worst enforced by the Court ". As the present writer is an officer of the Court and subject to the jurisdiction of the Disciplinary Committee it might be better, perhaps, to shelter behind counsel's opinion and say no more. But he cannot help being reminded of *Pratt* v. *B.M.A.* [1919] 1 K.B. 245. When, in that case, certain doctors were declared by their professional body to have offended against the honour and interests of the medical profession by accepting appointments with a clinic thought to be detrimental to the financial interests of the profession, the Court awarded them damages for libel and conspiracy, and the rules of the professional body were declared void as in restraint of trade. When, however, a solicitor is declared by his professional body to have offended in much the same way he is fined, and his punishment is upheld by the Courts. It is, of course, easy to distinguish the two cases on technical grounds—for example, in *Pratt's Case* there were no prescribed scales of doctor's remuneration and the B.M.A. and its rules had no statutory authority as

[1] But notes for the guidance of P.M.L.'s since issued by the Law Society (*per L. S. Gazette*, September, 1951, p. 350) imply that a waiver of the Rules is necessary if the P.M.L. does more than give ' oral advice '.

have the Disciplinary Committee and the Solicitors' Practice and Remuneration Rules. Nevertheless the realities of the two cases are too similar for one's peace of mind. If in fact the Solicitors' Rules produce the result reached in this case—and reasons have been advanced for doubting it—then it may be cogently argued that they too are contrary to public policy just as much as those of the B.M.A. in *Pratt's Case*, or those of the Association of Dental Manufacturers and Traders recently considered by the Monopolies Commission (see 14 M.L.R. 195).

And even if the solicitor's conduct did, as must be assumed, constitute a technical breach of the Rules, it is respectfully submitted to the Law Society that they did little service to the profession in instituting proceedings in this case. The lay Press constantly publish complaints about the alleged high legal costs in conveyancing matters. Most of these complaints are unfair and misconceived but this case gives the critics something to get their teeth into and hardly seems likely to reconcile the public to the much-needed increases in professional scales of remuneration for which the Law Society is pressing. Having regard to the fact that these increases require the blessing of the Government and Parliament it was surely ill-advised gratuitously to antagonise powerful trade union interests?

L. C. B. Gower.

Appeals and the Doctrine of Precedent

Vitkovice Horni a Hutni Tezirstvo v. *Korner*[1] marks the final phase in the litigation of a preliminary question of procedure, namely the service of notice of a writ out of the jurisdiction under R.S.C. Ord. 11, r. 1 (*e*) and r. 4. The determination of this question has taken five years and involved four appeals, culminating in a unanimous decision by the House of Lords in favour of the ruling first given by a Master in Chambers.

In April, 1946, Emil Korner brought an action claiming arrears of pension and salary due to him in England under alleged contracts with the appellants, who were a Czechoslovak firm, since nationalised; and he applied for leave to serve notice of the writ in Czechoslovakia. Leave was granted by Master Moseley in Chambers in May, 1946. On an application by the Czechoslovak firm under R.S.C. Ord. 12, r. 30, this order was set aside by Master Grundy in November, 1948. Korner's appeal to Slade J. in Chambers was dismissed in June, 1949, but his further appeal to the Court of Appeal was allowed by Bucknill and Singleton L.JJ. (Denning L.J. dissenting) in January, 1950, and the original order of Master Moseley, granting leave to serve notice of the writ out of the jurisdiction, was restored, with the qualification (based on the precedent

[1] [1951] 2 All E.R. 334.

of *Thomas* v. *Hamilton (Dowager Duchess)* [2]) that judgment could not be recovered for arrears of salary unless it appeared at the trial that his claim under this head was payable in England. The firm appealed to the House of Lords, who unanimously held that leave for service out of the jurisdiction had been rightly granted by the Court of Appeal and, with the exception of Lord Oaksey (who expressed no opinion on the matter), declared that the qualification inserted as to the claims under the service agreement was undesirable, but allowed it to stand because Korner had not cross-petitioned on this point.

In refusing leave for service out of the jurisdiction, Slade J. had considered himself bound by a statement by Lord Goddard, C.J., in the Court of Appeal decision in *Malik* v. *Narodni Banka Ceskoslovenska* [3] that, on an application for leave for service out of the jurisdiction under Ord. 11, r. 1 (*e*), the burden on the plaintiff under R.S.C. Ord. 11, r. 4, was to make out a prima facie case that there was a contract and a breach of it, but to ' satisfy ' the Court that the breach had occurred within the jurisdiction. The findings of the judges in the superior Courts on this point of precedent perhaps merit some consideration.

In the Court of Appeal—

Bucknill L.J.—

(a) doubted if Lord Goddard's words bore the meaning which Slade J. attributed to them,

(b) thought that if they bore that meaning they were obiter and therefore not binding on the learned judge or the Court of Appeal, and

(c) thought that if they were not obiter they were inconsistent with the decision of the Court of Appeal in *Thomas* v. *Hamilton (Dowager Duchess)*,[2] those of the Court of Appeal and the House of Lords in *Badische Anilin und Soda Fabrik* v. *Chemische Fabrik vormals Sandoz* [4] and of the House of Lords in *Tyne Improvement Commissioners* v. *Armement Anversois S.A. (The Brabo)*.[5]

Singleton L.J. thought that Lord Goddard's remarks were part of the ratio decidendi in *Malik's Case*,[3] and were binding both on Slade J. and the Court of Appeal, but he differed from Slade J. on the facts and thought the heavier burden of proof had been discharged.

Denning L.J. agreed that Lord Goddard's statement was part of the ratio decidendi in *Malik's Case*, thought that ' it may not be absolutely binding on us, but we ought to follow it unless there are strong reasons for not doing so ', but that there were

[2] 17 Q.B.D. 592.
[3] 176 L.T. 136; [1946] 2 All E.R. 663.
[4] 88 L.T. 490; 90 L.T. 733.
[5] [1949] A.C. 326.

no such strong reasons since it was not inconsistent with Lord Porter's speech in *Tyne Improvement Commissioners* v. *Armement Anversois S.A.* (*The Brabo*). He agreed with Slade J. that the required evidence of a breach of contract within the jurisdiction of the English Courts was not available, for reasons which the learned Lord Justice set out at length under five heads, and would have dismissed the appeal.

In the House of Lords—

Lord Simonds (*Lord Normand* concurring) expressed no opinion whether Lord Goddard's remarks were ratio decidendi or obiter dicta, thought that on the question of a breach within the jurisdiction something more than a prima facie case was required, ' did not quarrel ' with the expression ' a good arguable case '. but thought that Slade J. had set too high a standard and had in effect required to be satisfied on the point ' beyond reasonable doubt '.

Lord Oaksey thought that the standard of proof required on the question of a breach within the jurisdiction did not differ from that on the existence of a contract and a breach of it.

Lord Radcliffe said : ' I daresay he (Slade J.) was right in thinking that (Malik's) case did contain a statement of principle which was binding on him but, if it did, I think that the principle was not rightly expressed '. He also thought that no different standard of proof was required on the question of a breach within the jurisdiction from that on the existence of a contract and a breach of it, and said he could not himself be satisfied where a breach of contract had taken place without being at any rate as much satisfied that the contract existed and had been broken. He thought a prima facie case too low a standard, but that to be ' satisfied ' put the standard too high. He preferred the test of ' a strong case for argument '.

Lord Tucker approved Lord Goddard's remarks in *Malik's Case*, thought that different standards of proof were required on the different matters, expressly disapproved Bucknill L.J.'s statement to the contrary, ' felt considerable doubt ' whether Slade J. had misdirected himself in the present case, but was ' not prepared to dissent from the conclusion reached by your Lordships that he used language calculated to give the impression that he considered that a breach within the jurisdiction had to be proved to the same extent as matters in issue must be proved at a trial '.

The doctrine of precedent certainly becomes somewhat involved when in the Court of Appeal a majority of two members think that a puisne judge and the Court of Appeal itself is bound by a previous statement in that Court, whilst one member thinks the statement

merely obiter, whereas in the House of Lords two members think the statement was binding and three think the statement wrong but express no opinion on whether it was ratio decidendi or obiter dicta, and two of those appear to lay down a standard of proof intermediate between that required by Lord Goddard and that applied by the dissenting member (Denning L.J.) in the Court of Appeal.

Altogether the case provides not a very satisfactory object-lesson on the speed and cheapness of English justice, does nothing to define the graduation from ratio decidendi to obiter dictum, and may well become something of a museum piece for those who contend that the certainty of law is a childish illusion. The plaintiff, in the meantime, is now free to start his substantive action.

O. M. Stone.

Liability of Invitor for 'Unusual Danger' known to the Invitee

The decision of the Court of Appeal in *Horton* v. *London Graving Dock*,[1] which was thought to have finally set at rest the long-standing controversy over the exact duty owed by an invitor to his invitee, has now been reversed by a majority decision of the House of Lords (Lords Porter, Normand and Oaksey), two strongly dissenting opinions being delivered by Lords MacDermott and Reid: [1951] 2 All E.R. 1. The majority decision suffices to dispose of the controversy but whether in as satisfactory a manner as that arrived at previously by the Court of Appeal may be respectfully doubted.

It will be recalled that the facts of the case were that the plaintiff was a welder employed by sub-contractors to do repairs to a trawler. Part of the work involved working upon a staging which was provided by the defendants, who were the head contractors. The floor of this staging consisted of boards five feet apart, and while working thereon the plaintiff slipped and was injured. Lynskey J. held that the plaintiff had full knowledge of the dangerous character of the staging, and that accordingly it was not an 'unusual danger' to the plaintiff within the meaning of the rule in *Indermaur* v. *Dames*.[2] The Court of Appeal reversed this decision on the ground that an 'unusual danger' meant a danger not normally encountered in the particular circumstances and not just a danger which was unanticipated by the particular plaintiff. Accordingly it was held that the plaintiff's knowledge of the danger was not decisive to eliminate responsibility, Willes J., in *Indermaur* v. *Dames*, having merely referred to a warning as *one* of the modes by which in some circumstances an invitor might

[1] [1950] 1 All E.R. 180. See 13 M.L.R. 230.
[2] (1866) L.R. 1 C.P. 274.

fulfil his duty, but not as necessarily decisive in all cases. In this instance the Court of Appeal were of opinion that the fundamental duty to take care to prevent injury from unusual dangers had not been discharged merely because the plaintiff had full knowledge of the danger. Knowledge was only relevant to the possible defence of volenti (which was not actually pleaded) and this defence could not avail in the absence of evidence of consent to run the risk, which was lacking here.

All the learned Lords accepted the view of the Court of Appeal that the proper meaning of an 'unusual' danger is one of a kind not usually encountered by persons of the class of the plaintiff, or in the type of place or circumstances in which it occurred. So far then as the *existence* of a duty is concerned, this is created by the presence of an unusual danger, and the duty is not negatived by circumstances which show that from a subjective point of view the danger was not unexpected by the particular plaintiff concerned.

It would seem further that, despite verbal differences, all the learned Law Lords were also in agreement that the fundamental duty of the invitor is to take care to provide reasonably safe premises. The difference of opinion turned upon the circumstances which may result in a discharge of that duty. The rule is now laid down, apparently as a proposition of universal application, that an invitor's duty in relation to an unusual danger is automatically discharged if he can show that the invitor had full knowledge of the danger involved. It is immaterial for this purpose how the knowledge has been acquired, whether by an express warning given by the invitor, or by the invitee's own unaided experience, or by information imparted by third parties. Knowledge, therefore, does not prevent a duty arising but it does effectively discharge an existing duty. No doubt there is here a distinction of form but it hardly seems to be one of any substance having regard to the automatic operation of knowledge. Indeed, even analytically, the approach of Lynskey J. may be thought more satisfactory, viz., that a danger is unusual only in relation to the knowledge of the particular plaintiff and that full knowledge prevents any duty from arising. The alternative view involves the rather curious consequence that where there exists a danger which is unusual in the sense of not being normally encountered, but the plaintiff has full knowledge of its existence from the outset, the duty to the plaintiff exists but is destroyed at the moment of its birth. It certainly seems more natural in such a case to regard the duty as never having arisen.

Why should knowledge of the danger necessarily suffice to debar the plaintiff from his remedy? The opinions of the two dissenting Lords examine this question at length and with respect their arguments for rejecting this test seem both impressive and convincing. Lord MacDermott urges that where there is no binding authority it is permissible and proper, in choosing between two possible views,

to have regard to the reasonable requirements of the community which the law has to serve, and that though such a process demands great caution, the view which avoids a narrow and unreasonable rule should be preferred. Lord Reid, while recognising the advantage in some cases of fixed rules, deprecated the introduction of rigid rules in the realm of negligence and was of opinion that the decision of the majority was a departure from what should be the overriding test of what a reasonable man would do in the shoes of the defendant. With all deference, both these opinions seem more in accordance with the spirit of the common law, especially in relation to the development of the modern law of negligence, than the ruling of the majority.

There must be many cases where the mere knowledge of the plaintiff ought not, as a matter of justice and common sense, to debar him from his remedy. Lord MacDermott's illustration of an approach to a railway ticket-office with a dangerous roof, where all the railway has done is to post a notice describing the danger in clear terms, is a striking example of how a defendant can unjustifiably escape liability if a warning is in all cases to be decisive. Moreover, the majority rule has the effect in this branch of the law of obliterating the well-recognised distinction between sciens and volens, a sensible distinction which should be maintained in the absence of overriding considerations that hardly seem to exist in the case of the liability of invitors.

Since both the decision of the Court of Appeal and also the opinions of the dissenting members of the House of Lords recognised that a warning might in some circumstances suffice to discharge the duty, it may be thought that the majority decision does at least have the advantage of avoiding the necessity of distinguishing between the cases where a warning may or may not suffice. It may be suggested, however, that this is to apply a draconian solution to a problem which essentially calls for an individual approach, and further that it exaggerates the extent of the difficulty. Both Lord MacDermott and Lord Reid point out that broadly speaking the line is to be drawn between those cases where the danger is readily avoidable from the point of view of an informed and reasonably careful invitee, and those where (as in the case of the plaintiff, Horton) full knowledge gives no assurance of safety. The regret may however be permitted that the law on this topic ever started from the view that a warning might be a mode of discharging the duty rather than merely relevant to the issue of contributory negligence. Lord MacDermott also deprecated attempts to settle such a question as this by treating the ipsissima verba of Willes J. in *Indermaur* v. *Dames* as though they were part of an Act of Parliament to be construed accordingly. The tendency to treat judicial utterances as authoritative texts to be construed is unfortunately one to which the common law is peculiarly prone by reason of its doctrine of binding precedent, and much of our

reports are taken up with attempts to ascertain the exact meaning of words used in previous judgments. This is not just a question of ignoring the distinction between statements that are obiter and those which form part of the ratio decidendi—which in any event is one peculiarly hard to observe in practice—but is essentially a matter of approach. The value of such reminders as that given by Lord MacDermott and other members of the House is in emphasising that search should be made not so much for the exact sense in which words have been used in earlier judgments, but for the governing principle or the rationale upon which a rule is or should be based.

It remains to observe that none of the learned Law Lords thought that the rule of *Donoghue* v. *Stevenson*[3] could be prayed in aid by the plaintiff in the present case. No doubt this is an inevitable consequence of the rules as to invitees having been earlier formulated as a distinct topic, but it serves only to emphasise the misfortune that our law of negligence developed so late and in so piecemeal a fashion that it has not proved possible to apply one comprehensive rule of negligence to all situations in which the duty is based on reasonable care. Lord Porter pointed out that so far as the duty imposed on a manufacturer by *Donoghue* v. *Stevenson* is concerned, the probability of intermediate inspection negatives the duty, so that a fortiori no duty is owed to a consumer with actual knowledge of the defect. This undoubtedly demonstrates that there are cases where knowledge of the plaintiff may prevent a duty arising, with the result that it may be superfluous to rely upon the defence of volenti in the strict sense. The duty to warn a licensee as to concealed dangers known to the licensor is another illustration. It may be urged, however, that this is hardly an argument for eliminating the distinction between volens and sciens in cases where there is no special reason for so doing. Lord Reid indeed points to the explanation why a more limited duty is owed in the case of the manufacturer, since, having parted with control of the dangerous object, his duty may cease owing to circumstances which would not operate in the case of a person who retains continuous control of the source of the danger.

DENNIS LLOYD.

DANGEROUS SPORTS CONDUCTED ADJOINING HIGHWAYS—LIABILITY FOR NEGLIGENCE AND NUISANCE—REPRESENTATIVE ACTION AGAINST MEMBERS OF CLUB

A DOUBT may be respectfully ventured whether the decision in what will certainly be known in future as 'the Cricket-Ball Case' would have been the same if it had not involved an accident arising out of no mere lawful game but a highly meritorious national

[3] [1932] A.C. 562.

pastime. That conflict of interests—dear to the heart of Dean Pound and his school—which the courts are constrained to resolve, emerges in a singularly clear-cut form in a case such as *Bolton* v. *Stone* [1951] 1 All E.R. 1078. On the one hand, there is the cricket club whose members are making a lawful and laudable use of their ground by using it for the playing of cricket matches. On the other hand, there is the inoffensive pedestrian lawfully using the highway adjoining the ground and suddenly struck down by an exceedingly hard spherical object, harmless sounding enough when described as a cricket ball, but nevertheless capable of being an instrument of death and destruction. How is the law to settle in such a case upon whom the ultimate loss—in a pecuniary sense—is to fall? Are the cricketers to be obliged to curb their lawful recreation for the benefit of the innocent pedestrian, or is the pedestrian to be told that he is merely running one of the necessary risks attendant on membership of a sport-loving community? The answer given by the House of Lords in *Bolton* v. *Stone* is that this issue is to be adjudged purely on the basis of ordinary negligence. It was not questioned that the occupiers of the cricket ground who authorised or permitted cricket to be played there owed a duty of care to persons who might happen to be on the adjacent highway. In considering the scope of this duty, however, the House refused to accept the reasonable foreseeability of injury as the test. After citing Lord Atkin's celebrated dictum in *Donoghue* v. *Stevenson* [1932] A.C. at p. 580, that ' You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour ', Lord Porter emphasised that the likelihood of injury must be such as a reasonable man would contemplate. There must be sufficient probability to lead a reasonable man to anticipate it. For the existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken. Lord Normand held that the plaintiff must show that the defendants ought, as reasonable men, to have foreseen the probability of such an occurrence and that precautions had not to be taken against every peril that could be foreseen by the timorous. Lord Reid pointed out that in the crowded conditions of modern life even the most careful person cannot avoid creating some risks, but that the law only imposed upon him the duty not to create a risk which was substantial.

The case then resolved itself—after the manner of most negligence cases—into one of pure fact, *viz.*, was there a probability of injury, and if so had the defendants taken all reasonable precautions to avoid such injury? It is in considering what is meant in particular circumstances by that elusive word ' probable ', that there arises so much scope for difference of opinion and decision. How many times does an accident have to occur in a particular place or under particular conditions or when a certain modus operandi is employed for there to be a *probability* of injury? It is at any rate

clear that the word must be used here in a narrower sense than its normal meaning, which is that something is expected to happen rather than not to happen. For as a mere matter of mathematical probability most, if not all, the typical acts of negligence are unlikely to result in the majority of instances in injury to anyone and it is only the occasional act of negligence which is productive of an actual accident. If, for example, all the negligent acts or defaults of road-users were totalled up they would quite obviously be immensely more numerous than those relatively few acts or defaults which actually cause injury. Hence the probability is generally against injury resulting from a typically negligent act such as a motorist failing to give a proper signal when turning, but nevertheless no difficulty is experienced in holding him liable if an accident results.

With all deference it seems doubtful whether there is much substantial difference between the probability test in the restricted meaning given to that word in such legal phrases as the ' natural and probable consequences ' of an act, and the test, rejected in *Bolton* v. *Stone*, whether the accident was a reasonably foreseeable risk. The real objective of the test propounded by their Lordships was to exclude liability for injuries which are foreseeable but which are very unlikely or are merely remote possibilities. Yet surely the word ' reasonably ' prefixed to ' foreseeable risk ' is sufficient to exclude such contingencies without putting the test as high as to require an actual probability of injury. Nor does the case suggested by Lord Porter seem quite fair, *viz.*, that if the possibility of an accident were the test no one could safely drive a motor car, since the risk of an accident was obviously foreseeable. For all that the reasonable possibility of accident connotes is that the driver of a motor car owes a duty of care towards other road users, but whether he has failed in that duty must depend upon whether on the facts of the particular case he has taken the precautions which can be expected of a reasonably prudent driver.

To return to the facts of *Bolton* v. *Stone* there was certainly not a ' probability ' of injury to a passer-by from a cricket ball being struck into the highway. The probabilities from a mathematical point of view were all against it. But was it a contingency of so remote a character that no reasonable person could be expected to guard against it? The effect of the evidence was thus stated by Lord Porter: ' A witness who lived at the end house . . . said that five or six times during the last few years he had known balls hit his house or come into the yard. His evidence was quite vague as to the number of occasions, and it has to be observed that his house is substantially nearer the ground than the respondent's. Two members of the club, of over thirty years' standing, agreed that the hit was altogether exceptional to anything previously seen on that ground. They also said—and the learned judge accepted

their evidence—that it was only very rarely that a ball was hit over the fence during a match '.

Here then was a history of balls being hit, albeit on comparatively rare occasions, over the fence and on to the adjoining highway. Previously, however, when this occurred there did not happen to be any unfortunate passer-by with whom the ball collided. Nor is this surprising, for the mathematical probability of anyone being in the precise line of flight of the ball must be very low indeed. Nevertheless, there was the highway and the adjoining houses used and occupied by persons upon their lawful occasions, and an accident —indeed a serious accident—might readily be envisaged by a prudent person who might yet not deserve the epithet of timorous. But what, it may be asked, is the cricketer to do? No one can foresee the exact range of the batsman's prowess and the erection of a higher fence may simply arouse the emulation of the batsman to produce a further ranging stroke. Is it then necessary to say that the use of the Cheetham cricket ground for the highly laudable pursuit of the national game is to be abandoned because no precautions might be adequate? This point was squarely faced by Jenkins L.J. in the Court of Appeal when he remarked : ' If cricket cannot be played on a given ground without foreseeable risk of injury to persons outside it, then it is always possible in the last resort to stop using that ground for cricket '([1949] 2 All E.R. at p. 858). But to curtail the playing of cricket on a ground where matches had been regularly played since about 1864 is hardly a measure which would be lightly taken by an English court. Yet it is to be observed that Jenkins L.J. only refers to this as a last resort. If the learned Lord Justice's view were accepted that in the actual circumstances the injury was not a remote contingency, not reasonably foreseeable, further precautions might still have been taken to reduce the risk to a contingency so remote as to exclude liability. And, if such precautions were not practicable and the club preferred to go on taking a chance in the hope that nothing would happen, should the ultimate loss fall on the inoffensive passer-by or on the club who could easily cover their liability by insurance? Or is it more fitting that pedestrians should see they are covered by an appropriate accident policy before venturing into Beckenham Road on a summer's afternoon? It is difficult to avoid the reflection that if the injury had arisen out of some less established but not more dangerous sport, such as archery or the flying of model aeroplanes, the conflict of interest might well have been resolved in favour of the plaintiff. All of which only serves to emphasise how numerous and uncertain are the factors which necessarily go to produce a legal decision and that such a decision cannot be properly analysed as a mere exercise in logic or human reasoning.

On the issue of nuisance, which was pleaded as an alternative to negligence, it was conceded by the plaintiff that in a case of this

sort it was only possible to succeed in an action for nuisance if negligence was proved. Apart from Lord Reid, who reserved his view on this question, the House apparently accepted this as a correct statement of the law. At first instance, Oliver J. held that no action for nuisance would lie as the wrongful act was no more than an isolated occurrence. As Somervell L.J. pointed out, however ([1949] 2 All E.R. at p. 859), the real gist of the alleged nuisance—although admittedly the statement of claim did not plead it in this way—was not the striking of the ball by the batsman on the occasion when the plaintiff was injured, but the organising and carrying on of a game on property adjacent to a highway, whereby the public right of passage was hindered or rendered dangerous. The effect, therefore, of the opinion of the House of Lords is to carry yet a stage further the noteworthy tendency to restrict the scope of the older common law causes of actions which imposed a stricter liability than the more acceptable criterion—by modern standards—of negligence (see, *e.g.*, *Read* v. *Lyons* [1947] A.C. 156, and the recent decision in *National Coal Board* v. *Evans* [1951] 2 All E.R. 310). The old rule as to nuisance was that a person who creates a nuisance is liable for damage resulting whether he has taken all reasonable care to avoid the consequences or not (cf. *Rapier* v. *London Tramways* [1893] 2 Ch. 588; *Sedleigh-Denfield* v. *O'Callaghan* [1940] A.C. 880, pp. 897, 904). Nuisance, however, it has been held, is not applicable to personal injuries (*Cunard* v. *Antifyre* [1933] 1 K.B. 551), save in the case of persons injured on highways (see, *e.g.*, *Dollman* v. *Hillman* [1941] 1 All E.R. 335), and it is now held in the latter class of case that proof of negligence is, in any event, essential even in nuisance. Further, it would appear from the views expressed by Singleton and Jenkins L.JJ., in the Court of Appeal, that it may in this instance be more difficult to succeed in nuisance than in negligence since the creation of an occasional source of danger may give rise to liability in negligence, while not constituting a sufficiently continuous source of danger to amount to nuisance (see [1949] 2 All E.R. at pp. 852 and 856, distinguishing *Castle* v. *St. Augustine Links, Ltd.* [1922] 38 T.L.R. 615). No doubt the criminal aspect of public nuisance as being an indictable misdemeanour renders a court disinclined to hold that a public nuisance has been established by merely organising a cricket match on a field long used for that purpose.

One final point deserves comment. The Cheetham Cricket Club was an unincorporated society and the action was framed in a representative form against members of the committee of the club under O. XVI, 9 (see [1949] 2 All E.R. at p. 851). No point as to the form of the proceedings seems to have been raised at any stage, and therefore it remains uncertain whether *Bolton* v. *Stone* can be regarded as authority for saying that a representative action will lie, at any rate against representative defendants, in tort. If this is so such cases as *Mercantile Marine Association* v. *Toms*

[1916] 2 K.B. 243 (a case of libel) and *Hardie* v. *Chiltern* [1928] 1 K.B. 663 (a case of conspiracy) may stand in need of reconsideration. It may be that those decisions are to be limited to torts of the type there involved, and that dicta suggesting a wider principle excluding all torts from the sphere of a representative action are in need of qualification. The basis of those decisions was that the various members may be in different positions and have different defences available to them and it may be that in the case of some torts this possibility is so remote that a representative action will be maintainable. This certainly seems to be the case in many, if not all, types of negligence action, and *Bolton* v. *Stone* may perhaps be treated as introducing a useful extension of the scope of the representative action. In considering the effect of that decision for this purpose it has to be borne in mind that where a representative action is wrongly constituted this is not a defect which can be put right by waiver (*London Association for the Protection of Trade* v. *Greenlands* [1916] A.C. 15).

Dennis Lloyd.

Servants and Independent Contractors

Cassidy v. *Ministry of Health* [1951] 1 All E.R. 574 is likely to become a leading case in the law of tort and also in labour law. It is the first case in which the Court of Appeal has held a hospital authority liable for the professional negligence of its permanent medical staff. In a sense this principle is not 'new'. There is an earlier decision of Hilbery J. to the same effect,[1] and the Court of Appeal itself had foreshadowed this development in 1942 when it was held that nurses and radiographers were servants of the hospital authority and that the latter was liable for the torts committed in the course of their employment.[2] Moreover, the House of Lords had in 1936[3] done all it possibly could to throw doubt on the ambiguous and unfortunate decision of the Court of Appeal in *Hillyer* v. *St. Bartholomew's Hospital*[4] which

[1] *Collins* v. *Hertfordshire County Council* [1947] K.B. 598; [1947] 1 All E.R. 633. This is the 'cocaine'-'procaine' case. In the case under review Somervell L.J., at p. 579, while approving the decision of Hilbery J. in the *Collins Case*, criticised his application of the traditional 'control' test.

[2] *Gold* v. *Essex County Council* [1942] 2 K.B. 293; [1942] 2 All E.R. 237. Note that Goddard L.J., [1942] 2 All E.R. 250, said that a hospital authority was liable for doctors on the permanent staff working under a contract of service. In the *Gold Case* this was a mere dictum, but it was a significant departure from the earlier approach.

[3] *Lindsey County Council* v. *Marshall* [1937] A.C. 97; [1936] 2 All E.R. 1076, especially *per* Lord Wright [1936] 2 All E.R. 1094.

[4] [1909] 2 K.B. 820. In the *Gold Case* [1942] 2 All E.R. 240, Lord Greene M.R. said of *Hillyer's Case* that 'there can be few cases in the books which have given rise to such a diversity of judicial statement as to the precise nature of the point decided'. The judgments of Kennedy L.J., and of Farwell L.J.,

has overshadowed the law for over forty years and the ghost of which has now been laid, one may hope, for good. Thus, without going into the very complicated 'case history' of this problem in any detail, it can be said that, as frequently happens with decisions of fundamental importance, the case under review is merely the final consummation of a development which had been going on for many years. The importance of this development, however, transcends the actual problem decided by the court, because the decision is based upon a transformation of the traditional 'control' test, *i.e.*, of the test which is being used in order to distinguish between a servant and an independent contractor, and between a contract of employment (or of service) and a contract for work and labour (or 'for services').

The traditional test was that a person working for another was regarded as a servant if he was 'subject to the command of the master as to the manner in which he shall do his work',[5] but if the so-called 'master' was only in a position to determine the 'what' and not the 'how' of the services, the substance of the obligation but not the manner of its performance, then the person doing the work was said to be not a servant but an independent contractor, and his contract one for work and labour and not of employment. This distinction was based upon the social conditions of an earlier age: it assumed that the employer of labour was able to direct and instruct the labourer as to the technical methods he should use in performing his work. In a mainly agricultural society and even in the earlier stages of the Industrial Revolution the master could be expected to be superior to the servant in the knowledge, skill and experience which had to be brought to bear upon the choice and handling of the tools. The control test was well suited to govern relationships like those between a farmer and an agricultural labourer (prior to agricultural mechanisation), a craftsman and a journeyman, a householder and a domestic servant, and even a factory owner and an unskilled 'hand'. It reflects a state of society in which the ownership of the means of production coincided with the possession of technical knowledge and skill and in which that knowledge and skill was largely acquired by being handed down from one generation to the next by oral tradition and not by being systematically imparted in institutions of learning from universities down to technical schools. The control test postulates a combination of managerial and technical functions in the person of the employer, *i.e.*, what to modern eyes appears as an imperfect division of labour. The

proceed on totally different lines, and Cozens-Hardy M.R. agreed with both. The judgment of Kennedy L.J. is now generally regarded as wrong. The confusion was increased by the fact that in *Smith* v. *Martin* [1911] 2 K.B. 775 Farwell L.J. purported to give an authentic interpretation of his own judgment in the *Hillyer Case* of which MacKinnon L.J. said in the *Gold Case*, at p. 245, that it was 'not a correct summary' of the earlier judgment.

[5] *Per* Bramwell L.J. in *Yewens* v. *Noakes* (1880) 6 Q.B.D. 530.

technical and economic developments of all industrial societies have nullified these assumptions. The rule respondeat superior (and, one may add, the whole body of principles governing the contract of employment) 'applies even though the work which the servant is employed to do is of a skilful or technical character, as to the method of performing which the employer himself is ignorant'.[6] To say of the captain of a ship, the pilot of an aeroplane, the driver of a railway engine, of a motor vehicle, or of a crane[7] that the employer 'controls' the performance of his work is unrealistic and almost grotesque. But one need not think of situations in which the employee is physically removed from his employer's premises: a skilled engineer or toolmaker, draftsman or accountant may as often as not have been engaged just because he possesses that technical knowledge which the employer lacks. If in such a case the employee relied on the employer's instructions 'how to do his work' he would be breaking his contract and possibly be liable to summary dismissal for having misrepresented his skill. No wonder that the Courts found it increasingly difficult to cope with the cases before them by using a legal rule which, as legal rules so often do, had survived the social conditions from which it had been an abstraction. The judgments in *Mersey Docks and Harbour Board* v. *Coggins & Griffiths*,[8] show plainly enough that the control test had to be transformed if it was to remain a working rule and to be more than a mere verbal incantation.

The present case takes this development a step further. The plaintiff lost the use of his left hand and underwent severe and protracted pain as a result of negligent treatment following an operation upon his hand. It was clearly a case of res ipsa loquitur in so far as the fact of negligence was concerned, but it was not clear whether this negligence had to be imputed to the whole-time assistant medical officer, to the house surgeon, or to one of the nurses of the hospital. The three members of the Court (Somervell, Singleton and Denning L.JJ.) agreed that it was unnecessary to investigate which of these three persons was to blame. The hospital authority was liable for the full-time medical men as well as for the nurse, and it was so liable although it was not alleged that any of them was not fully competent. Although there is a faint indication in the judgment of Singleton L.J. that the hospital authority

[6] *Per* MacKinnon L.J. in the *Gold Case* [1942] 2 All E.R. at p. 244.

[7] See *Mersey Docks and Harbour Board* v. *Coggins and Griffiths* [1947] A.C. 1; [1946] 2 All E.R. 345. In this case the House of Lords was compelled to give a new meaning to the 'control' test, see *per* Lord Simon [1946] 2 All E.R., at p. 348; *per* Lord Porter, at p. 351; *per* Lord Simonds, at p. 352; *per* Lord Uthwatt, at p. 353. See C. Grunfeld's Note in (1947) 10 M.L.R. 203.

[8] Lord Simon's formula (at p. 348) comes very near to what one may call the 'subordination' or 'organisation' test. Where does the authority lie to direct, or to delegate to the workman the manner in which he should do the work? Who delegates the discretion the workman exercises? Here subordination to the employer's managerial power is made the criterion, and this, it is submitted, is the only possible way of dealing with the matter in the conditions of modern industry.

might be liable for lack of co-ordination of the work,[9] the decision rests fairly and squarely on vicarious liability and not on the master's culpa in eligendo or failure to provide a 'safe system'. It rests, in other words, on the employer's liability for the technical and professional shortcomings of his highly trained staff and not on his own shortcomings in the exercise of his managerial functions.

Somervell and Singleton L.JJ. based their judgments on the fact that the two doctors as well as the nurse were permanently employed and salaried members of the staff.[10] Somervell L.J. emphasised that they were subject to the standing orders of the local authority which was the hospital authority at the relevant time, and Singleton L.J. mentioned that the corporation was in a position to make rules concerning the organisation as distinguished from the performance of the doctors' work, *i.e.*, if it may be put that way, to rule the 'where' and the 'when' rather than the 'how'. This, it is submitted, is very much in line with the speeches in the House of Lords in the *Mersey Case*: the development is in the direction of something like an 'organisation' in preference to a 'control' test. In future the question may perhaps be: 'did the alleged servant form part of the alleged master's organisation?' rather than 'was he subject to his orders in the actual doing of his work?' Such an approach might be more satisfactory than the somewhat vague 'common sense' approach also suggested by Somervell L.J. which would make everything dependent on whether 'an ordinary person' would call the contract one of service.[11] Such common sense tests are sometimes the response of the Courts to situations in which 'harder' criteria have been overtaken by events. They have a way of collapsing in marginal cases and of leading to a maze of casuistry without much principle.

Both Lords Justices agreed that the limitations of vicarious liability coincided with those of the contract of employment, *i.e.* (though in the circumstances of the case this amounted to no more than obiter dicta), that the hospital authority was not liable for the negligence of visiting surgeons and physicians. It is at this point that Denning L.J. took a totally different view. Although the difference between him and the other members of the Court did not affect the actual decision, it does go to the ratio decidendi. Denning L.J. applied the principle that where a person is under a liability to use care, he cannot get rid of it by employing an independent contractor.[12] Hence, it is, in his opinion, irrelevant whether the doctor or surgeon working at a hospital belongs to the permanent

[9] [1951] 1 All E.R., at p. 584.
[10] *Per* Somervell L.J., at pp. 578 f.; *per* Singleton L.J., at p. 581.
[11] At pp. 579 f.
[12] At pp. 586 f. And see at p. 585: 'What possible difference in law, I ask, can there be between hospital authorities who accept a patient for treatment and railway or shipping authorities who accept a passenger for carriage? None whatever. Once they undertake the task, they come under a duty to use care in the doing of it, and that is so whether they do it for reward or not'.

staff. All that matters is whether it was the hospital authority or the patient who had selected the specialist. The distinction between a servant and an independent contractor is (in regard to vicarious liability) only relevant where the person 'employed' is charged with an act of 'collateral negligence', but not with the negligent performance of the act which he had undertaken to perform, *e.g.*, the negligent treatment of a patient by a consulting specialist. This bold and new approach to the problem is very much to be preferred to its more traditional handling by the other members of the Court, and it may very well foreshadow future developments. As Denning L.J. himself mentioned, the policy behind the *Hillyer* decision [13] may have been to protect the charitable hospitals. The advent of the National Health Service justifies a radical change in judicial policy towards the rights of patients, and the judgment of Denning L.J. may point the way towards the future.

For the time being, however, it would not be safe to rely on Denning L.J.'s view being accepted by the Courts in a case in which the difference between the rationes decidendi of Denning L.J. and the majority would decide the issue, a case which, in view of the growing importance of part-time or 'sessional' hospital attendance by paid specialists, may come before the Courts any day. What is, however, clear is that the control test is vanishing. This means that, in this respect, English law is coming much closer to some of the Continental systems. In France the test is whether the person doing the work is '*dans une situation de subordination*',[14] and this criterion which has been accepted by the Cour de Cassation [15] does not mean '*une notion . . . de technicité*'.[16] It means the submission of the employee to the employer's power '*de co-ordonner*', *i.e.*, to organise. Otherwise, it is pointed out, there could be no contract of service, no locatio conductio operarum unless the employer possessed all the divergent technical capacities of the members of his staff. Similarly in Germany, where the test is that of 'dependence', which is very similar to the French idea of submission to the employer's co-ordinating power.[17] This is another example of the similarity of developments in common law and 'civil law' systems which are simply enforced by the irresistible power of economic necessities.

Finally, it may be noted that in the case under review the Ministry of Health did not deny its liability as successor to the previous hospital authority, a municipal corporation, by reason

[13] At p. 585.

[14] P. Durand, *Traité de Droit du Travail*, Vol. II (1950), No. 127, p. 223; A. Rouast and P. Durand, *Précis de Législation Industrielle*, 4th ed. (1951), No. 262, p. 343.

[15] Cases quoted by Durand, *loc. cit.*, p. 241, n. 1.

[16] Durand, *loc. cit.*, p. 243.

[17] See, *e.g.*, Hueck and Nipperdey, *Lehrbuch des Arbeitsrechts* (1927), Vol. I, p. 36. 'Dependence' is identical with '*Eingliederung*' (integration) into the employer's organisation.

of section 6 (2) of the National Health Service Act, 1946, under which on the appointed day, July 5, 1948, all existing liabilities incurred solely for the purposes of a transferred hospital were taken over by the Ministry. The case is no authority on the question whether the Ministry is liable for torts committed after the appointed day by the servants of Regional Hospital Boards and Hospital Management Committees, a question which goes to the root of the law of public corporations.[18]

O. Kahn-Freund.

A Council's Powers

In *Manton* v. *Brighton Corporation* [1951] 2 All E.R. 101 the facts were simple. The plaintiff was an alderman of Brighton county borough. On May 25, 1950, he was appointed in the usual way to serve for one year on three standing committees; on December 21, 1950, the council appointed an ad hoc committee to inquire into certain alleged conduct of the plaintiff relating to council house allocation. This committee reported and recommended that the plaintiff 'should no longer serve on any committee of the council': the council adopted this recommendation. The plaintiff claimed that he had been appointed for one year to the committees and was entitled to continue to exercise all his rights and privileges as a member of those committees until the year expired. He asked for a declaration and an injunction.

Slade J. gave judgment for the defendants. He said that the words appointing the plaintiff for one year did not mean that he should continue in all circumstances as a member of those committees throughout the ensuing year but merely indicated that in normal practice he would do so. The larger question was whether, despite this interpretation, the council had power to revoke the resolution appointing the plaintiff before his year of office on the committees expired. The learned judge found support in *Huth* v. *Clarke* (1890). In the present case, he said, 'most of the functions of the standing committees were to make recommendations to the council, but in some cases they were entrusted with the exercise of executive powers. . . . In so far as the delegation is of executive powers, it seems to me that the appointor must be able to determine the authority of the appointee. If there is power to revoke the authority of a committee as a whole, in my judgment, there must be a power to revoke the authority of any single member thereof'.

It is suggested, with respect, that the logic of this argument is assailable. When a committee is established, there are two

[18] See W. Friedmann, 'The New Public Corporations and the Law', (1947), 10 M.L.R. 233, 377; Glanville L. Williams, *Crown Proceedings* (1948), pp. 21 ff.; pp. 30 ff.

distinct and separate operations. The first is the decision to establish the committee and the delegation to it of certain powers enjoyed by the council. The second is the appointment of individual members to serve on the committee. The council can, at any time, decide to abolish or vary the powers of the committee. The council can, according to *Huth* v. *Clarke*, itself exercise the powers it has delegated, although the committee remains in existence, for ' delegation does not imply a denudation of power and authority '. (Some observations of Scott L.J. in *Blackpool Corporation* v. *Locker* which appear to conflict with this view were not cited.) But it does not follow that *because* the council can abolish a committee, or vary its powers, or act despite its existence, *therefore* the council can revoke the appointment of any member of the committee. There is only one act of delegation and that is to the committee itself; there are no separate acts of delegation to the members of the committee. The power to cancel the appointment of members derives from the resolution which prescribes their appointment, not from the resolution which delegates powers to the committee.

There is a principle of considerable importance involved in this decision. Everyone knows that the real work of a council is done, and must be done, in committee. A member debarred from committees may speak at council meetings, held monthly or quarterly, on matters which are the subject of recommendations from committees or on other matters on the agenda; he will probably be allowed to speak only once or perhaps twice on each matter; he will find difficulty in speaking at all on matters over which a committee has executive powers. Should an elected body have power so to exclude one of its elected members from participation? The Local Government Act, 1933, provides for the disqualification of members of a council and its committees if they have acted improperly in certain specified ways. It may be assumed that whatever the plaintiff in the present case was alleged to have done, the alleged action did not fall within any of these provisions. There have long been complaints that, in practice, certain councillors find appointment to certain committees very difficult, and there is, of course, no right of appointment to any committee at all. It may be that the Act of 1933 needs amendment to enlarge the number and type of offences for which a councillor may be removed; the Act certainly needs amendment to ensure that a properly elected councillor has the opportunity of participating fully in the affairs of the council and its committees. Above all, the decision whether a councillor is unfit to participate fully or at all should rest, not with his fellow councillors, but with an independent tribunal. Whom the electorate hath joined, let not an ad hoc committee put asunder.

J. A. G. Griffith.

Editorial Note

It happens from time to time that a decision of a lower court discussed in this *Review* is subsequently affirmed or reversed by a higher court, but that, as a result of lack of space or because the appeal decision does not present any additional feature of special interest, no mention is made of it in these pages. In future we propose to publish lists of such appeal decisions so as to prevent a wrong impression of the development of English case law being created in the minds of our readers. On the present occasion we go back to January, 1949, and include Volumes 12 and 13 and Nos. 1 and 2 of Volume 14.

Wilson v. *Kingston Corporation* [1948] 2 All E.R. 780 (Vol. 12, p. 96), affirmed by the Court of Appeal : [1949] 1 All E.R. 679.

Smith v. *London Transport Executive* [1948] 2 All E.R. 306 (Vol. 12, p. 98), affirmed by the Court of Appeal : [1949] 2 All E.R. 297, and by the House of Lords : [1951] 1 All E.R. 667.

Re Diplock [1948] 1 Ch. 465 (Vol. 12, p. 103), affirmed by the House of Lords *sub nomine Ministry of Health* v. *Simpson* [1950] 2 All E.R. 1137.

Philco Radio v. *Spurling* [1949] 2 All E.R. 129 (Vol. 12, p. 501), affirmed by the Court of Appeal: [1949] 2 All E.R. 882.

Re Reading's Petition of Right [1949] 2 All E.R. 68 (Vol. 12, p. 503), affirmed by the House of Lords *sub nomine Reading* v. *Att.-Gen.* [1951] 1 All E.R. 617.

Re Mill's Declaration of Trust [1950] 1 All E.R. 789 (Vol. 13, p. 507), affirmed by the Court of Appeal : [1950] 2 All E.R. 292.

Earl FitzWilliam's Wentworth Estates Co. v. *Minister of Town and Country Planning* [1950] 2 All E.R. 765 (Vol. 14, p. 73), affirmed by the Court of Appeal : [1951] 1 All E.R. 982.

Best v. *Samuel Fox & Co.* [1950] 2 All E.R. 798 (Vol. 14, p. 84), affirmed by the Court of Appeal : [1951] 2 All E.R. 116.

William Cory & Son v. *City of London* [1950] 2 All E.R. 584 (Vol. 14, p. 205), affirmed by the Court of Appeal: [1951] 2 All E.R. 85.

This list was compiled on August 26, 1951.

O. K.-F.

REVIEWS

THE COMMUNITY OF THE FUTURE. By Fr. VINDING KRUSE, LL.D. [London : The Oxford University Press. 1950. 828 pp. 42s. net.]

THERE can be few if any authors, certainly among lawyers, so well equipped to carry through the ambitious project indicated by the title of this book as Professor Kruse. He has not only held the Chair of Jurisprudence at the University of Copenhagen with distinction for many years, but he has played a prominent part in the public life of Denmark. To be a citizen of one of the smaller nations is not without its compensations, for it seems to entail a necessary familiarity with the arts which is too often lacking in men of the same calibre in large bustling States, and also a scholarship ranging widely over the institutions of other leading countries. Certainly Professor Kruse is a striking exemplar of this thesis, at any rate in regard to knowledge and appreciation of Anglo-Saxon institutions.

Nevertheless the work is hardly successful. Legal institutions must obviously provide the framework for any projected community, but the interest of a picture such as the one attempted here will lie naturally in patterns of detail which are not of a legal character. In spite of his astonishing erudition, an erudition by no means of the dry as dust variety, Professor Kruse is not altogether convincing in this brush work, and the result is a composition vague in some places, and rather overweighted with detail of a rather commonplace character in others. If he had been content to restrict the scope of his treatment of the problem to its legal aspects, the fundamental importance of which he very properly emphasises, he would have written a shorter and better book.

Nevertheless much of what Professor Kruse has to say on the non-legal side is of absorbing interest, especially perhaps to readers of *The Modern Law Review* who will appreciate a broad and humane sociology, continuously controlled by legal discipline and a keen sense of the practicable. Professor Kruse himself had a great deal to do with the Danish legislation relating to housing and town planning which contains much that is novel and interesting. Some of the most valuable passages of his book originate in his practical experiences of this kind.

The Community of the Future requires 'a new type of man', and this accordingly forms the subject-matter of Book 1. Professor Kruse has no doubt that the main problem here is that of ethical values. Religion, at any rate the old religion, no longer provides the categories which satisfy. Science has taken its place, but the social sciences which are particularly concerned with these matters are 'in a highly imperfect state', so that there is 'fundamental strife and doubt on the ethical questions, on morals, and rights'. The solution will be reached along empirical lines: 'the ethics of the future cannot therefore . . . set up absolute commandments'.

The new man needs an ethic which fits him for life in the new community, and this requires study of a number of matters which have been neglected by earlier moral philosophers such as health of mind and body, and the effect of earning capacity and industrial training on character. Moreover, the new community will be more and more 'founded on beauty', so that the æsthetic evaluation acquires a significant social importance. Religion must then return to provide 'the ultimate synthesis': though the religion rather vaguely indicated in Chapter 7 would not satisfy the dogmatic requirements of any orthodox creed.

Law must provide the foundations for the new community, and this is the theme of Book 2. We thus require an investigation of the purpose of law which proceeds upon somewhat orthodox lines, although the progress which Professor Kruse foresees as natural developments carries him into interesting speculation. The life of the new community will be, indeed is becoming, much more concerned with moral and spiritual factors. The law has so far made very limited efforts to protect these from injury. It must be altered so that 'spiritual injury' becomes a main category of the law of injuries, and love of neighbour must become a positive duty. This conception is sketched out interestingly in connection with the law of libel, the protection and requirements of children, and in other ways. It is interesting that the most striking modern development in the English law of tort, *Donoghue* v. *Stevenson* should have originated in much the same conception.

Book 3 is devoted to the New Community. Part I which is concerned with Personal Rights is treated on orthodox lines, but develops some of the points made in the section just mentioned, and opens up new categories for the purpose of strengthening the family. Like the sociologists Professor Kruse regards the family as one of the fundamental strong points in the human battle, but in the modern community it is shot at with new weapons against which old laws do little to protect it. A chapter is accordingly devoted to the consideration of this problem.

The right of property which forms Part II of this Book has already been the subject of an earlier volume by Professor Kruse which appeared in English in 1940 and was the subject of a detailed sympathetic review by Professor Martin Wolff in 3 M.L.R. p. 241. I do not propose to add anything to what is there said. Modern communities are, however, based upon industrial, commercial and even agricultural organisation in which the citizen derives his livelihood not from the use of rights in property of a greater or less extent but from what are called earnings. Here too the law is in process of adjusting itself, not altogether satisfactorily. Part III of this book is accordingly concerned with the 'right to earn'. Professor Kruse considers the development of this right both in urban and agricultural industries and shows how it has been influenced by the law. The *locus classicus* for this is the common law which is discussed with knowledge and sympathy. Nevertheless, law has nowhere succeeded in providing institutions in any real sense adequate to this immensely important aspect of human activity. The liberal or *laissez faire* solution has been proved wanting. Professor Kruse is exceedingly sceptical of the socialist solution also. He proposes a third solution which he calls the 'system of perceptive law' and which, sketched in most inadequately in view of its importance, appears to be directed to an ad hoc solution of each problem along the lines of the legal categories discussed in the earlier part of the volume. It appears to be a mixed or eclectic economy having a number of points of resemblance to that existing in Great Britain at the present time.

The corner stone of the *Community of the Future* is naturally its political constitution, and this provides the subject-matter for discussion in the final part of Book 3. Professor Kruse is exceedingly critical of modern democratic government, but nevertheless regards it as altogether preferable to autocracy, and especially that pernicious form of autocracy the modern dictatorship which he holds to be 'a danger to human civilisation'. The great value of Democracy is the freedoms which go with it, its main weakness, the stupidity, selfishness, and hysteria of the masses in whom political power resides. If this 'unrestricted' Democracy could be replaced by an 'élite corps of electors' who would use the vote with intelligence, knowledge, and restraint all would be well. But he does not really convince us that such an electoral élite is practical politics.

The book then fades away into a few unsatisfactory pages relating to the court system of the new community, which are followed by a short unsatisfactory index. After this we get a final essay on the method of the social

sciences—a somewhat inconsequent and haphazard ending to a book in which so much thought and work has been concentrated.

C.

Unraveling Juvenile Delinquency. By Sheldon and Eleanor Glueck. [London: Geoffrey Cumberlege, Commonwealth Fund. 1951. xii and 399 pp. 40s. net.]

The outstanding contribution which Professor and Mrs. Glueck of Harvard have hitherto rendered to criminology consists of two series of comprehensive follow-up studies of young delinquents, covering a fifteen-year span after their penal and corrective treatment. We owe to this formidable work a new insight into the prospects and dynamics of social readjustment. With the present volume the authors turn from the vertical to the horizontal approach in that they undertake to 'unravel' the causes of juvenile delinquency by comparing a sample group of 500 delinquents with a corresponding non-delinquent control group. Since Sir Cyril Burt developed this method in his classic *Young Delinquent* twenty-five years ago, the search for *the* cause of delinquency has given way to the recognition of a 'multiple causation'; delinquency is always due to a coincidence of social and personal factors. While many time-honoured predilections and prejudices have thus been discredited, even the sincere student of criminology finds himself lost in the endless variety of possible crime risks. The remedy is to restrict the field of observation by deliberately eliminating and thus neutralising some of the numerous factors. For this purpose Professor and Mrs. Glueck collected a control group which matched the delinquents in four essential aspects; age, general intelligence, ethnic origin (very important in a great immigration country like the U.S.A.), and residence in an underprivileged neighbourhood. The description of the planning and the performance of the research work is a fascinating story in itself. The authors pursued investigations on four independent levels; socio-cultural conditions, somatic characteristics, specific intellectual tendencies, and emotions and temperamental traits. By social inquiries, medical investigation, anthroprometric examination, psychological tests (especially Rorschach test), and psychiatric interviews 402 items were determined for each of the 1,000 boys. Each research worker was kept unaware of the results of his fellow-workers in a different discipline. Only the authors themselves correlated the independent partial findings into one comprehensive picture.

To begin with, this new investigation confirms certain facts which one might expect from former studies. This applies to the obvious significance of the 'under-the-roof situation'. Nearly two-thirds of the delinquents as against one-third of the non-delinquents came from homes broken by death, separation, divorce, or prolonged absence of one of the parents (122). Among the delinquents' parents a higher proportion was not living together, or was not married. Three-quarters of the delinquents as against one-third of the non-delinquents had to struggle with emotional conflicts; among the delinquents a higher proportion of these conflicts was due to tension in the family circle (247). In 94.3 per cent. of the delinquent cases, as against 44.5 per cent. of the non-delinquents, the discipline of the father was unsatisfactory, *viz.*, either overstrict, lax, or erratic (131).

At the same time, certain other observations which are usually put forward as symptomatic of juvenile delinquents, have been refuted by the evidence presented. In the comparison of American delinquent and non-delinquent boys from underprivileged areas, conditions of the mother's pregnancies, circumstances of the boys' births, their glandular conditions, their position in the order of brothers and sisters seem irrelevant. There is no difference in the size of families, or in the number of forced marriages. The type of the fathers' occupations, skilled or unskilled, is less significant than their work

habits (106). Both groups of boys show the same incidence of club membership, but every second delinquent had been 'directed' into the club by parents, probation officer, etc.

What characterises these American delinquent boys is that they are on the whole a physically homogeneous group, of a solid, muscular type, with broad shoulders, a tapering torso, somewhat retarded in early years, with a growth spurt at the age of thirteen or fourteen (184 seqq.). Both in the choice of occupation and in their leisure-time pursuits they have a predilection for the adventurous. Their school life is irregular, with an early beginning of misconduct and truancy. As to character traits, revealed by the Rorschach test, feelings of insecurity and/or anxiety, of being unwanted or not loved or of not counting, so often attributed to delinquents, are almost equally spread among delinquents and non-delinquents (226). It is rather the way in which the individual reacts to such difficulties which distinguishes the two groups: the delinquents are much more on the defensive, inclined to be suspicious, hostile, with a tendency to destructiveness. These observations seem to indicate a shifting of emphasis from the trauma in early childhood to the delinquent's personality, without the error of exaggerated reliance on genetics. The authors sum up their findings by the statement that juveniles with those bodily characteristics and personal traits have a high probability of becoming delinquents if they are brought up in families with a bad social inheritance (281).

The primary importance of this book lies in the high standard it sets for criminological research. As in the case of the authors' follow-up studies, this investigation of causes of juvenile delinquency will serve as a model for many other research projects. The authors' own main conclusion is that a more detailed study of the roots of delinquency will enable us to forecast the juveniles' future conduct. As in previous volumes the symptoms of a future criminal career have been statistically assessed and are presented in the form of prediction tables, this time based on the results of social inquiries, the Rorschach test, and psychiatric interviews. While in this country there are still some doubts whether this extreme rationalisation of human judgment does not involve new errors under the disguise of scientific accuracy, the authors make a good case for stressing the importance of an early diagnosis of the potential delinquent. Indeed, the main lesson of the book is the need for prevention, the focus on childhood and family life, on proper guidance for temperamental demands, and on sound outlets for subconscious forces which are much more powerful than a conscious acceptance of rules and commandments (287 *seqq.*). Thus, empirical criminology has learnt to face the complex web of crime causation without bowing to it as an unalterable necessity, to deal, in the authors' final words, with 'destination, but not with predestination'.

M. Grunhut.

Corporation Trust and Company. By C. A. Cooke, M.A., LL.D., Fellow of Magdalen College, Oxford. [Manchester University Press. 1950. 206 pp. 15s.]

This book traces the history of the three concepts of joint stock, trust and corporation which finally merged to form the modern limited company. Dr. Cooke describes it as 'an Essay in Legal History', but in truth it is something more, for the learned author looks at his subject as an economist, political scientist, and legal philosopher as well as an historian and this fact accounts in no small measure for the value of his monograph. At the same time, it has certain disadvantages since students, who lack his versatility and familiarity with the current jargon of all these disciplines, may at times find it heavy going. This is particularly noticeable in the first few chapters, but

once Dr. Cooke gets into his narrative stride difficulties disappear and even a beginner could use the book with advantage as a more up-to-date and stimulating substitute for Formoy's *Historical Introduction to Modern Company Law.*

Dr. Cooke ends his survey with the Companies Act, 1862, when, as he says, the marriage of trust and corporation had been consummated. Nevertheless one can regret that he has not carried his essay further, for it is arguable that it is not possible fully to assess the part played by the company in the modern economy without a glance at the second marriage of trust and corporation in the modern Unit Trust and, more especially without consideration of the Company's offspring—the Public Corporation. In truth Dr. Cooke gives brief consideration to Nationalisation, on which he has some wise words (at pp. 179–180), but without dealing with the nature of the organisation evolved in connection with it.

Dr. Cooke's design has not been to emulate the detailed researches into the original sources such as have recently been carried out, notably by DuBois, Hunt and Shannon, but rather to accept their results and to trace from them general tendencies and to draw general conclusions. If the remarks which follow suggest that he has not always made full use of the published material now available (it is to be regretted that he omits a bibliography) and that at times his generalisations seem to be over-simplified, this must not be taken as an attempt to minimise the great value of his book. Having recently been doing some work in the same field I am very conscious of the labour that I should have avoided had it been available earlier and of the errors which it has prevented me from perpetrating.

I cannot help feeling that Dr. Cooke's treatment of the eighteenth century would have been different and better had he made greater use of DuBois: *The English Business Company, 1720–1800.* There is only one reference to this invaluable work and that (a footnote at the end of Chapter VI) appears to have been an afterthought. Apart from differences of emphasis at least one minor error of fact would have been avoided. This occurs at p. 83 in connection with the bursting of the South Sea Bubble. Dr. Cooke says 'The crash came in September after the Lords Justices had granted writs of *scire facias* against a number of purported companies. Under this writ the companies had to show that their activities conformed to a grant of incorporation, and where this could not be proved the company came to an end. Several companies were thus killed off . . .'. In fact, as is shown in DuBois' fully documented account, writs were issued against four such companies but proceedings were discontinued shortly afterwards and the companies continued to operate, three of them for the greater part of the century or beyond. Incidentally, since *The MODERN Law Review* should perhaps be kinder to the unhistorically-minded reader than is Dr. Cooke, it may be worth pointing out that the Lords Justices were not a judicial body (as a modern lawyer familiar with the Court of Appeal might be forgiven for supposing) but the Regents acting in the absence of the King in Hanover; they did not try the actions but merely authorised and directed the law officers to institute them.

Nevertheless, the treatment of the eighteenth century contains much of value; particularly as a corrective of the view which is becoming widespread, that incorporation is an essential pre-requisite of joint stock enterprise. I particularly liked the explanation (at pp. 93–4) of how the developments during this century account for the fact that America uses the terms 'corporation' and 'inc.' while we use 'company' and 'ltd.'.

Dr. Cooke's account of the nineteenth century is most lucid and instructive. He has naturally made particular use of B. C. Hunt's researches although unfortunately he appears to have overlooked the fact that the latter's final results were published in book form in the Harvard Economic Studies under

the title *The Development of the Business Corporation in England, 1800–1867*. Dr. Cooke refers only to the preliminary articles in the *Journal of Political Economy* which merely cover the period to 1844.

The learned author sees the struggle for simple and cheap incorporation as a battle between Equity lawyers fostering the Deed of Settlement Company and the common lawyers jealously guarding the privilege of incorporation. This surely is an over-simplification? It is true that the Deed of Settlement Company was based on the Trust, but it had been evolved by common lawyers like Sgt. Pengelley, as well as Chancery men, and they did their utmost to keep it out of the jurisdiction of courts both of law and equity. When they failed Chancery proved little more complaisant than the King's Bench—indeed, Eldon was their arch enemy and far more hostile than Lord Ellenborough or Tindal C.J. To say, as Cooke does (*e.g.*, at p. 187), that limited liability was 'accepted by the Chancery Courts' is just not true; on the contrary they opposed it and if it was attained de facto it was in spite of both law and equity and not because of them—unless one is to give them credit for the inadequacies of their remedies which made pursuit of the individual shareholders virtually impracticable. Incidentally, is Dr. Cooke justified in referring to Bellenden Ker (the author of the famous report on Partnership of 1836) as 'a common law man' (p. 125)? He was, surely, a Lincoln's Inn conveyancer who afterwards became conveyancing counsel to the Court of Chancery?

Consistently with his general thesis, Dr. Cooke regards the formal introduction of Limited Liability in 1855 as of little importance, a view shared by many economists and by Maitland. I feel myself that this opinion underestimates the unsatisfactory consequences of the previous law, under which even a de facto limitation of liability was highly precarious and more readily available to the shark and the stag than to the honest permanent investor. And the vast increase in company formations which immediately followed the reform seems to prove that its value was not inconsiderable. I am grateful to Dr. Cooke for introducing me (at p. 157) to John Bright's explanation of why the Palmerston Government, at the height of the Crimean War, insisted on rushing through the Limited Liability Bill as a matter of the utmost urgency—an intriguing mystery. Bright alleged that it was because the Government wished to be able to say that something had been done besides voting money for the War. Dr. Cooke does not appear to find this convincing, and neither do I. A more likely explanation, surely, is that members of the Government and Legislature were beginning to be seriously concerned about their personal positions. My colleague, Mr. H. L. Beales, believes that these misgivings were brought to a head by the financial embarrassment, resulting from membership of an unlimited company, of an M.P. named Russell; unfortunately neither he nor I have been able to confirm this but if Dr. Cooke, or any reader can do so I shall be grateful.

A good point is made at p. 119 when Dr. Cooke points out that the various Companies Acts of 1844–5 were merely examples of a wider nineteenth century tendency to pass general statutes covering matters which had previously been left to Private Bill Legislation; he instances Divorce, Municipal Corporations, Naturalisation and Railways.

Attention may be drawn to the following minor slips or dubious statements: *All* shareholders need not consent to a reduction of capital (p. 17). Are the Inns of Court incorporated (p. 67)? The orthodox view is to the contrary. The liability of partners is generally *joint*, not joint and several (p. 87). Various references to the Companies Act, 1929, should be to the Act of 1948 (pp. 114, 161, 162, 163). Schedule A of the Joint Stock Companies Act, 1844, was hardly 'a model set of provisions for the deed of settlement' (p. 138); it was merely a list of subjects and the present Table A seems to have owed less to it (p. 159) than to the Companies Clauses Act, 1845. 'Special Resolution' no longer means what it did from 1856–1929 (p. 160).

Nor do I understand why Dr. Cooke persists in dating the Bubble Act as 1719, in fact it was passed (as his own account on p. 83 recognises) in June, 1720. Finally, I do not think that Dr. Cooke's account (at pp. 167 and 169) of the effect of later legislation on existing companies is entirely clear. His remarks may give the impression that all existing companies had to register, whereas, in fact, companies established before 1844 have never been compelled to do so.

These, however, are small points, and in a book which covers so much ground the only wonder is that there are so few statements to which objection can be taken. Enough will, I hope, have been said to show that I have read it with very real enjoyment and I have no hesitation in warmly recommending it as a most illuminating and thought-provoking study of a subject of importance to lawyers, economists and students of history and Government.

L. C. B. G.

Crown, Community and Parliament in the Later Middle Ages. Studies in English Constitutional History. By Gaillard T. Lapsley. Edited by Helen M. Cam and Geoffrey Barraclough. [Oxford : Basil Blackwell. 1951. 25s.]

An American, and a Harvard man, Lapsley settled in our English Cambridge and for many years was an outstanding figure at Trinity both as tutor, lecturer in the university, and as an original and fruitful mediævalist. In his retirement he collected some of his papers which grouped themselves naturally under the title he chose for this book, but did not live to complete his revision of them. All these papers are well known: the entertaining investigation of the earl who produced a rusty sword as his answer to a writ of *quo warranto*; the classical study of the *buzones* and the whole question of the county court; the pioneer study of the knights of the shire which gave the initial impetus to the Government scheme for a *History of Parliament*; the paper on the Parliamentary crisis of 1341, and finally two massive studies of the deposition of Richard II and the accession of Henry IV with special reference to the part of Parliament in those events.

This is a rich feast indeed, and historians and students who have long been used to studying these papers will be grateful for having them assembled in this pleasant volume. It would have been still better if the editors had added to the author's original selection such things as his judicious paper on the county court in 51 L.Q.R. 299, together with a bibliography and portrait for the benefit of those who knew him not; to those who did, his majestic presence is quite unforgettable.

T. F. T. Plucknett.

International Law. The Collected Papers of Sir Cecil J. B. Hurst. [London : Stevens. 1950. x and 302 pp. 30s.]

Sir Cecil Hurst, the oldest and most respected of living English international lawyers, celebrated his eightieth birthday in 1950, and to mark the occasion Messrs. Stevens published this volume of *The Collected Papers of Sir Cecil Hurst* at the suggestion of some of his friends.

The volume has been divided into four parts. The first consists of the Presidential Addresses delivered to the Grotius Society in 1944 and to the Institute of International Law in 1937. The other three parts are devoted to papers published in *The British Year Book of International Law*, papers read to the Grotius Society, and the course of lectures on diplomatic immunities delivered at The Hague Academy of International Law in 1926. While much

may be said in favour of this division, it might perhaps have been more useful if the persons responsible for the actual compilation of the volume had arranged it in such a way that articles dealing with related subjects appeared together. Thus The Hague lectures run from p. 171 to p. 294, but the *British Year Book* article of 1929 on modern developments with respect to diplomatic immunities appears at p. 111.

When one reads this volume one is struck by Sir Cecil's happy knack of writing upon subjects which may well have been topical at the time of writing, but which possess a lasting interest and value. As early as 1923 Sir Cecil posed the question 'Whose is the Bed of the Sea?' In 1945 President Truman published his proclamations on the exploitation of the Continental shelf and nearly every article written upon this subject purports to base itself upon Sir Cecil's opinions. In 1948 Sir Cecil himself wrote upon the Continental shelf and used the opportunity to point out that the oil company and other vested interest lawyers were taking his arguments much further than he ever intended. His article, as usual, is objective and independent, and stands as a vindication of the rule of law.

Another of Sir Cecil's papers which has had great influence was the subject of an address to the Grotius Society in October, 1946. By Article 13 of the Charter of the United Nations the General Assembly is enjoined to 'initiate studies and make recommendations for . . . encouraging the progressive development of international law and its codification'. In November, 1947, the Assembly established the International Law Commission with a view to fulfilling this task. In his 1946 address Sir Cecil put forward a 'Plea for the Codification of International Law on New Lines'. In this paper Sir Cecil points out the disadvantages that automatically attach to any attempts at codification made by Government delegates. He wants a co-ordinated effort on an international and a national plane, and believes that individuals working in a private capacity have much to contribute. Finally, unlike many members of the International Law Commission, he is fully aware of the distinction between the *lex lata* and the *lex ferenda* and realises that codification correctly pertains only to the former.

For a number of years Sir Cecil was a member of the Permanent Court of International Justice, and many of his separate opinions are still cited as lucid expositions of the law. It is a little unfortunate, perhaps, that the International Court of Justice in its recent decision in the *Asylum Case* (1950) did not bear in mind what Sir Cecil said on this subject at The Hague, although it is true that Judge Azevedo, in his dissenting opinion, used words reminiscent thereof. Sir Cecil wrote that 'the question (of asylum) is today purely academic. . . . Such relics of the right of asylum as may still be found are due to the continuance of political conditions in certain countries which at moments of political crisis expose politicians of the unsuccessful party to the risk of loss of life. In the countries of Latin America the custom of receiving political refugees at foreign embassies and legations at moments of crisis is still recognised'.

All that remains is to add our congratulations to Sir Cecil and to thank him for showing during the thirty years covered by these papers the reality and vitality of international law.

L. C. Green.

Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act. By Denis Victor Cowen, Professor of Law in the University of Cape Town, Advocate of the Supreme Court of South Africa. [Cape Town and Johannesburg : Juta & Co., Ltd. 1951. vii and 50 pp. 10s. 6d.]

Section 152 of the South Africa Act, 1909, provides that no Bill to amend or repeal that section or certain other 'entrenched sections' of the Act shall

be valid unless passed by a two-thirds' majority of both Houses sitting together. Section 35, which is one of the entrenched sections, safeguards Cape voters from disqualification by reason only of race or colour. The present South African Minister of the Interior recently moved for leave to introduce the Separate Representation of Voters Bill, which removed Cape coloured voters to a separate electoral roll. The Speaker of the House of Assembly was then asked to rule whether the Bill did not require to be passed by a joint sitting of both Houses in accordance with section 152. On April 11, 1951, he ruled that it did not.

Assuming that the Bill in question fell within the ambit of section 35, there is no doubt that the present Government's refusal to follow the procedure prescribed by section 152 was a breach of a constitutional understanding. With such a matter the Speaker was not concerned; his duty was only to rule whether section 152 was still binding in strict law. In ruling that it was no longer binding, he adopted the all but unanimous view of constitutional authorities. According to this view, the entrenched sections derived their validity until 1931 from the rule that South Africa could not legislate repugnantly to a United Kingdom statute extending to South Africa. With the abolition of the doctrine of repugnancy by the Statute of Westminster, and in the absence of any saving clause in the Statute to protect the method of amending the South Africa Act, the Union Parliament became fully sovereign and acquired competence to repeal the entrenched sections, expressly or by implication, by ordinary legislative procedure in disregard of section 152. This view was strongly supported by the decision of the South African Supreme Court in *Ndlwana* v. *Hofmeyr* (1937) and, somewhat obliquely, by a Privy Council case (*Moore* v. *Att.-Gen. for the Irish Free State* (1935)).

Against this weight of authority there was raised the dissenting voice of Professor Cowen, whose pamphlet was published shortly before the motion to introduce the Bill. His arguments were adopted by the Opposition in the House, and they were briefly examined, but rejected, in the Speaker's ruling. They may be summarised as follows: The South Africa Act, an Act of the United Kingdom Parliament, is the Act that gave birth to the Union Parliament. Section 152 prescribes the rules which the constituent elements of Parliament must follow in order to legislate on a subject within the scope of the entrenched sections. A measure passed in contravention of these rules would not be an Act of Parliament at all, any more than a measure passed by one House alone would be. Since such a measure would not be a valid law, to attribute the binding force of the entrenched sections to the former doctrine of repugnancy is wrong, for repugnancy can only arise between two otherwise valid laws. Hence neither the doctrine of repugnancy nor its abolition by the Statute of Westminster are relevant to the discussion; the entrenched sections were, and remain, binding because they prescribe the manner and form in which the will of the South African Parliament is to be manifested for certain purposes, or alternatively, because they state what *is* the South African Parliament for those purposes. This conclusion is compatible with the view that once its will has been duly expressed, it has unlimited (or 'sovereign') legislative powers.

Professor Cowen's discussion of the problems is the ablest and most thorough that has yet been published. If one hesitates to assert that his conclusion is clearly right and the orthodox conclusion wrong, that is because neither authority nor analogy are helpful guides and because argument at the level of fundamental principle is conducted between two theories of Parliamentary sovereignty that are almost equally attractive. On balance, Professor Cowen's seems to be slightly the better opinion; but if the law is a prediction of what the courts will do, then his opponents must be said to have the stronger case.

The author deliberately refrains from expressing opinions upon the effectiveness of possible attempts by the Union Parliament to bind *its own*

action in regard to the manner of legislation; or upon the question whether legislation by the United Kingdom Parliament must comply, as a condition of its validity, with the manner and form required by existing law. If, however, one accepts his argument in relation to the entrenched sections, it becomes difficult to deny its applicability to these further situations. For this reason, if for no other, this excellent study deserves close attention from anyone who is interested in the basic problems of constitutional law in England.

S. A. de Smith.

Justice and Administrative Law. Third Edition. By Professor W. A. Robson. [London: Stevens & Sons, Ltd. 1951. xxxiii and 674 pp. 30s.]

Professor Robson's book is of course a classic on administrative justice and its main features are familiar to most lawyers. The high standard of the previous edition is maintained; in particular it is remarkable in view of the rapid developments how comprehensive and up to date is the account of administrative tribunals in the re-written and much enlarged Chapter 3. To prevent the book from becoming too long, the detailed criticism of the Report on Ministers' Powers contained in the second edition has been omitted. Although the author deals chiefly with administrative tribunals and their procedure and backs his preference for an Administrative Appeals court rather than an appeal to the courts by well reasoned and powerful argument, perhaps more attention to the present scope of judicial review might be given. We are told that review is possible only 'when an inferior tribunal have acted ultra vires or have behaved improperly' and that the decisions of the rent and national insurance tribunals are final (pp. 207, 271): What of error on the face of the record? At p. 123 it is stated that under the Housing Acts the Minister, once an objection has been lodged, and the inspector holding the inquiry are bound by the rules of natural justice: whether Denning L.J.'s opposite view that *Franklin's Case* has overruled the earlier authorities is sound should have been examined.

The author might consider the following small points in the next edition: the statement (p. 112) that only the Minister of Transport and the Home Office hear licensing appeals is contradicted by the author himself who states at p. 185 that the Minister of Education also has such powers; p. 439 gives the impression that the Crown Proceedings Act makes the Crown liable for the torts of policemen: at p. 441 *East Suffolk Rivers Catchment Board* v. *Kent* is cited as authority for the proposition that public bodies have no duty to show diligence comparable to that imposed in France; it seems unfair to blame the courts since the Act only gives the body *power* to act—if Parliament intended to impose a duty it should have said so, whereupon the courts would have provided a remedy. At p. 133 it is stated that the Minister must refer to the Medical Advisory Committee the *report* of an appeal from a finding that a medical practitioner has not shown reasonable skill. Regulation 11 of the National Health Service (Service Committees and Tribunals) Regulations, 1948, requires the Minister to refer 'the case' to the Committee, although it is true that regulation 42 mentions 'the Medical . . . Advisory Committee constituted under regulation 11 of these regulations to whom he shall refer such report'. Is it clear beyond doubt that the report must be referred, and does the Ministry so interpret it?

H. Street.

THESE RIGHTS AND FREEDOMS. U.N. Publications Sales No. 1950. I.60. [London : H.M.S.O. 1950. iv and 214 pp. 10s.]

SINCE the wartime disclosures of the activities of the Nazis in their concentration camps there has been a great deal of documentation, both official and non-official, on the subject of human rights. The United Nations has already published four *Yearbooks* on Human Rights, in which surveys of developments in national legislation and international agreements are printed. Now the United Nations Department of Public Information has issued a small book describing the achievements of the United Nations during the first four years of its existence in so far as fundamental freedoms and human rights are concerned.

The last thirty or so pages of the book are devoted to the texts of those documents which have been drawn up under the auspices of the United Nations to cope with various aspects of the protection of human rights. Here will be found the Universal Declaration of Human Rights, the Conventions on Genocide, News Transmission, Freedom of Association and the Right to Organise, and that concerning the Application of the Right to Organise and Bargain Collectively. The Declaration of Human Rights, as has been pointed out time and time again in writings and in public statements, is not binding on anybody, while the non-ratification of most of these conventions serves to reiterate the warning in the book: 'Let no one think that the task of creating universal respect for human rights and freedoms is an easy task. It is not'.

Despite this warning the reader of *These Rights and Freedoms* may well be left with the feeling that the various organs of the United Nations have sought to do too much too fast. 'The human rights programme of the United Nations is broad and dynamic. It is concerned with the rights and freedoms of all men everywhere. It is designed to safeguard for all time man's heritage of basic rights and fundamental freedoms.'

That the programme is broad is made very clear by this book. Apart from discussing the history of the drafting and development of the Universal Declaration of Human Rights, to which no less than 75 of 169 pages are devoted, although there can be few people interested in human rights who have not had their surfeit of this historical discussion, the main body of the book is devoted to summarising the debates and activities of the United Nations in connection with the first draft of the proposed International Covenant of Human Rights, with freedom of information, the rights of minorities, of women, of refugees and displaced persons, and of trade unions.

In addition, one chapter deals with the drafting and adoption of the Genocide Convention. In this chapter there occurs a statement that one would never expect to find in a publication of the United Nations. Reference is made to the concept of 'crimes against humanity' in the London Agreement of 1945, and the discussion continues 'Thus, it was established that the brutality of a government to its citizens was no longer a matter of purely domestic interest but was of international concern'. It is also asserted that by 'crimes against humanity' the Four Powers meant inhuman acts 'committed against any civilian population before or during the war or persecution on political, racial or religious grounds'. This is to ignore completely the difference between the semicolon in the London Agreement and the comma in the amending Protocol; and the fact that the Nuremberg Tribunal made it perfectly clear that such crimes were, by the Agreement, only within the jurisdiction of the Tribunal if they were connected with the war, and therefore atrocities against Germans in, for example, 1933 were not crimes against humanity unless so connected. It is also a little strange to find no reference to the activities of Professor Lemkin, who first used the term genocide. Instead, one is left with the impression that the initiative lay with Cuba, India, Panama and Saudi Arabia.

Finally, twenty pages are concerned with the problems of forced labour, slavery and the protection of human rights in trust and non-self-governing territories.

The main defect of United Nations publicity on human rights lies in the facile manner in which the subject is treated. There seems to be an underlying theory that if empty phrases are repeated often enough they will become real. This can never be so with matters so fundamental to State sovereignty as the treatment by a State of its own nationals. In the concluding chapter it is pointed out that 'The exclusiveness and intolerance associated with competitive nationalisms, religions, races and cultures are real factors in all societies in our modern world. They are accentuated by fear. They are shielded by ignorance. They find positive expression in ideological dogmas. Rooted deep in the folklore of groups and classes, they tend to be transmitted from generation to generation'. Here there is evidence of some conception of reality. If only the United Nations—and its publicity department—would devote a fraction of the energy it dissipates in talking and writing about human rights to tackling the problems underlying this quotation, the future status of the individual might look far more hopeful than it does.

L. C. Green.

International Law Through the Cases. By L. C. Green. [London: Stevens & Sons, Ltd. 1951. xxviii and 913 pp. £3 15s.]

For many reasons decisions on international law are not always readily accessible to the student. Although there exist useful case-books on international law in the United States, the student in this country is not too satisfactorily served in that he has only Mr. Pitt Cobbett's book to resort to. Mr. Green was therefore fully justified in deciding to publish a new case-book. It is unfortunate, however, that the price is likely to be in excess of the means of the average student for whom the book is primarily designed.

Usually a case-book requires of its editor not only the mechanical effort of using scissors, but also the intellectual effort of selecting his material. Mr. Green was almost wholly relieved of the latter task. Last year Dr. Schwarzenberger published a second edition of his *Manual of International Law*. Those cases which he regards as of major importance are there marked with an asterisk. Mr. Green felt himself bound by Dr. Schwarzenberger's decision both in a positive and a negative sense: he has included all cases marked by Dr. Schwarzenberger with an asterisk and, with a very few exceptions, excluded all cases not so marked or even mentioned by Dr. Schwarzenberger. It is in these circumstances, then, that Mr. Green came to print some cases the significance of which will not be obvious to the student of international law; *Lord Advocate* v. *Wemyss* [1900] A.C. 48, dealing with constitutional law and the Scottish law of landlord and tenant, *R.* v. *International Trustee for the Protection of Bondholders* [1937] A.C. 500, which is a leading case in private international law, or *Croft* v. *Dunphy* [1933] A.C. 156, which does not carry the point of public international law beyond the principles of *The Le Louis* (1817) 2 Dods. 210, printed by Mr. Green at p. 412—these are examples of decisions the inclusion of which cannot be explained otherwise than by the sacrosanctity of Dr. Schwarzenberger's asterisk. The same starting point accounts for the omission by Mr. Green of decisions such as *Bank of Ethiopia* v. *National Bank of Egypt* [1937] Ch. 513, a case which, however unfortunate it may be, relates to an important point and is of considerable educational value, and also explains some other astonishing facts: no decision rendered by a municipal court outside Great Britain, the Dominions and the United States of America finds a place in

Mr. Green's book, and the Supreme Court of the United States, which has made such enormous contributions to the development of international law, is represented by not more than five decisions (pp. 237, 385, 669, 714, 775).

To pursue these matters further would be unfair to Mr. Green who is entitled to be judged by his own work and should not be saddled with responsibility for Dr. Schwarzenberger. Mr. Green's own work lies in editing the decisions themselves, that is to say, in deleting those passages which do not relate to the point of principle, and in summarising the issues. Although some may differ on points of detail, it would appear that in these respects he has, on the whole, taken the right course.

F. A. Mann.

A Manual of International Law. By B. Galpin. [London: Sweet & Maxwell. 1950. viii and 88 pp. 6s.]

In 1947 Messrs. Sweet & Maxwell published the second edition of Mr. Jackson's *Manual of International Law*, the object of which was 'to cater for the needs of those University students reading the subject for Schools or Finals'. Their imprint now appears on a book which is no more than half the size of Mr. Jackson's, but which its author hopes 'will come into the hands not only of those studying for examinations (for whom, however, it is principally designed), but also of those who take an interest in the international problems which beset us, but lack the time or inclination to give detailed and laborious study to the subject. They will find here an epitome of the principles of international law, and some account of the practical attitude of States towards their theoretical rights and obligations'. If this statement were justified, Mr. Galpin's *Manual* would indeed deserve careful consideration.

It is impossible in a short review to point out all the errors and careless statements appearing in this treatise. It should be sufficient to draw attention to one or two points only. Even before the International Court of Justice delivered its advisory opinion on the *International Status of South-West Africa*, it was generally understood that there was no obligation upon mandatories to enter into trust agreements with regard to the territories under their care. Mr. Galpin devotes a page to the problem of mandates, although the only one which remains is that for South-West Africa, while his sole reference to the trusteeship system is to be found in a footnote: 'the mandatory Power was responsible to the League of Nations, and is now responsible to the United Nations, for the proper administration of the territory'. Another statement which has been carelessly made concerns the registration of treaties: 'The former members of the League of Nations were obliged by Article 18 of the Covenant of the League to register their treaties with the League Secretariat, before they could assume any rights under them. This obligation is now extended to members of the United Nations by Article 102 of the United Nations Charter'. This statement is certainly not true of Article 102, while the *Pablo Najera Claim* (1928) between France and Mexico shows that it is not a true description of the position under the Covenant. Similarly, it is surprising to learn that 'the position of enemy and neutral shipping in time of war is at present regulated by the Declaration of London'.

It is interesting to note what Mr. Galpin considers to be the relative importance of various international institutions: the International Labour Organisation three lines; the Permanent Court of Arbitration one page; the International Court of Justice two pages, in which there is no reference to the Optional Clause; the League of Nations and the United Nations three pages each; while the Council of Europe is apparently the most significant organisation in the world, for no less than five, out of a total of 88, pages are devoted to it.

L. C. Green.

An Introduction to International Law. By J. G. Starke, b.a., ll.b., b.c.l. Second Edition. [London : Butterworth & Co., Ltd. 1950. 397 pp. 27s. 6d. net.]

The first edition of J. G. Starke's *International Law*, published in 1947, suffered from complete absence of any considerations concerning international institutions which were tackled in an Appendix of two and a half pages only. The present, second, edition devotes a special chapter comprising forty-five pages to the above subject. Unfortunately the plan of the chapter lacks internal balance. The first three sections of the chapter (fifteen pages) are concerned with a general introduction to international institutions and provide the reader with a number of interesting remarks of a comparative character. The remainder of the chapter (twenty-five pages) deals with the United Nations and the International Labour Organisation. But here the efforts of the author in the field of international institutions come to an end. All remaining international institutions (the ten specialised agencies), among them organisations of such vital character as the Bretton Woods agencies, are dealt with on less than one page. Moreover the reader seeks in vain in this section for some reference to the Havana Charter and the GATT which would at least have deserved to be mentioned in an edition published in 1950.

C. H. Alexander.

The New Industrial Law. By W. F. Frank, dr. jur., m.sc. (econ.), b.com., ll.b. [London : The Thames Bank Publishing Co., Ltd. 1950. xix and 456 pp. 35s. net.]

The title of this book brings to mind the old story of the man whose watch was correct and reliable to the minute and who came to a country in which all clocks and watches were ten minutes fast. The owner of the reliable watch was ten minutes late for all his appointments, but he was able to pride himself on his punctuality and to reproach his friends for their inaccuracy. The term 'industrial law' has, in this country, quite unaccountably and quite wrongly, been appropriated for the subject which in the rest of the world (including the United States) is called 'labour law'. But, regrettable though it may be, the undesirable terminology has, for the time being, come to stay, and a book bearing the title of the work under review is expected to deal with the relationship between employers and employed, with trade unions, trade disputes, collective bargaining, minimum wages, and other matters of this kind. Dr. Frank's book discusses such matters only in a concluding chapter entitled 'Some Current Labour Problems', devoted mainly to the vital question of the relationship between labour mobility and the law, *i.e.*, with problems of education and training and of placement, regulated in the Education Act, 1944, the Disabled Persons (Employment) Act, 1944, and the Employment and Training Act, 1948, as well as in Statutory Instruments (most of them no longer in force) which deal or dealt with direction of labour, control of engagements and similar matters. This chapter appears to be the first attempt made by any author to give a systematic description of what one may call the law of the labour market and to explain the legal provisions against their economic background. Although one could have wished for a more detailed analysis of the relevant provisions in the National Insurance Act and of disqualification for unemployment benefit as a lever towards enforcing mobility of labour, this chapter must be welcomed by those interested in labour law or in what most people in this country still call industrial law.

The remainder of the book, however, *i.e.*, 379 out of 456 pp., treats of a subject for which the term 'industrial law' would have been an admirable designation if it was still available, but which is not directly connected with employment at all. The term 'economic law' has been suggested (and used abroad) for the sum total of those legal principles and provisions which regulate economic enterprise in the public interest. To the reviewer this term has always appeared to be as undesirable as the English use of the word 'industrial law', and he sympathises with Dr. Frank's refusal to employ it. The principles of nuisance regulate economic conduct as much as do those of conspiracy, and the law governing the sale of goods is, in any relevant sense of the word, 'economic law' no less than the law of restraint of trade. Yet (quite rightly) the author does deal with conspiracy and with restraint of trade but not with either nuisance or the sale of goods. Broadly speaking what he calls 'industrial law' comprises the principles regulating competition and monopoly (including statutory monopolies, *e.g.*, patent law) as well as those which are concerned with the establishment of private industrial business units and with the utilisation of their capital assets. It excludes agriculture, trade (*i.e.*, the purely distributive side of private enterprise) and finance, but even with this limitation the author's selection of topics is (perhaps necessarily) somewhat arbitrary. He has a very interesting chapter on the location of industry, *i.e.*, on the development which led from the pre-War 'special areas' legislation *via* the Barlow Report to the Distribution of Industries Act, 1945, and from there to what one may call the 'industrial' aspects of the Town and Country Planning Act, 1947. (The Distribution of Industries Act, 1950, came after the completion of the work.) He also has a chapter which he (rather ambitiously) calls 'Industrial Organisation' and in which he surveys the history leading up to Sir Stafford Cripps' 'working parties' and to the Industrial Organisation and Development Act, 1947, and gives a detailed analysis of that Act and of the constitutions and functions of the various development councils established by virtue of its provisions. There follows a chapter on the Statistics of Trade Act, 1947, which includes a useful summary of the legislative development and of the Reports on the Censuses of Production and Distribution (at this point Dr. Frank deviates from his basic scheme, but it is difficult to blame him for it). Much the longest chapter of the book is called 'Monopoly and the State', and constitutes an attempt to summarise the common law attitude towards the problem of competition and monopoly, the American Anti-Trust legislation, and the Monopoly and Restrictive Practices Act, 1948. The penultimate chapter of the work deals (on 28 pp.) with the 'Elements of English Patent Law' and, further, with the Development of Inventions Act, 1949, and with some aspects of the Patents and Designs Act, 1949.

From this brief survey it will be seen that the author covers a great deal of ground, and—this, in the reviewer's opinion, is one of the merits of the book—that he has ventured into fields carefully avoided by most legal writers as being outside the province of 'lawyers' law', whatever that phrase may mean. It will, however, also be seen that a considerable number of topics germane to Dr. Frank's endeavour have been omitted. Even a consideration of the law strictly confined to 'industry' can hardly ignore price regulations, export and import control, and even exchange control. Moreover, some aspects of company law, notably the provisions concerning publicity and accounts, are as significant in this context as the legislation on trade statistics. Development councils should be understood as part of a general picture in which Regional Boards of Industry, the Economic Planning Board, and the National Joint Production Committee on Industry (though not based upon statutes) deserve a place more prominent than a passing reference. And one may feel that an author so much interested in the protection of the consumer should not have entirely ignored the consumers'

councils established under the statutes dealing with public enterprise. The constitution and functions of the public corporations administering nationalised industries impinge so much on the private sector of industry that Dr. Frank might consider whether his work would not gain in practical usefulness if he included a chapter on these matters in a future edition.

The author is a lawyer as well as an economist. The reviewer is not qualified to judge the merits of those parts of the book which deal with matters of economic theory (*e.g.*, the analysis of the meaning of 'monopoly' in economic science), but he welcomes Dr. Frank's attempt to explain common law as well as statutory principles in their economic setting. This seems to him to be a real merit of the work. Thus, the introductory pages of the chapter on monopoly which confront and contrast the economic and legal definitions and approaches are highly instructive to the lawyer, and, one ventures to think, equally useful to an economist. The author was able to draw on the American literature in which this kind of treatment has almost become a matter of course, while in this country it is still a novelty. There is, however, a certain incongruity in the book in that the economic and historical introductions to the various chapters show a great deal of thought and penetration while the analysis of the statutes themselves does occasionally not go very much beyond a bare paraphrase of the legislative text itself. One gets the impression that the author is very much better where he analyses the history of an institution than where he puts it into a systematic legal framework.

It is impossible and probably undesirable that anyone writing on topics of this kind should conceal the basic social and political assumptions which direct his thinking. The author hardly attempts to do so. He shows plainly enough that he belongs to the 'neo-liberal' school of thought, and that planning is to him at best a necessary evil. To choose as one's motto for a chapter on 'conclusions' concerning planning a quotation from Herbert Spencer is about as meaningful as to use a quotation from Voltaire for a discussion of the Catholic Church or a quotation from St. Ignatius for a discussion of atheism. Sometimes Dr. Frank's predilection for the 'free enterprise' society produces curious results as where he talks of the pre-1914 period as a time 'when the population of Britain was still increasing' and when 'declining industries were allowed to pass away peacefully, without any large-scale dismissals of employees and consequent unemployment'. Although he is well aware that a gigantic administrative apparatus is needed for the purpose of forcing competition upon an unwilling industry, there is discernible in his central chapter on monopoly that curious naïveté of the liberal who is profoundly convinced of the inefficiency of the State in all matters of economic enterprise and of its well-nigh omnipotence in the prevention of private monopoly. He obviously has failed to think out the admittedly formidable problem of the victimisation of the consumer by an alliance between organised employers and organised labour. At p. 137 he expresses misgivings with regard to the danger of 'corporativism' inherent in the Development Councils, while at p. 139 he confidently and dogmatically asserts that 'employer and trade union representatives will cancel each other out in the case of a vote being taken'.

The present reviewer happens not to share the author's political philosophy. Perhaps many passages in the book which the author considers as a statement of scientific truth strike the reviewer as more than a little tendentious. Nevertheless it would be churlish and hypocritical to assert that anyone could have written a book on these matters with the objectivity of a mathematician. Whatever its limitations, this is a meritorious piece of work, and it should prove to be useful not only for lawyers and social scientists, but also to the industrial advisers to whom it appears to be primarily addressed.

O. Kahn-Freund.

CRIPPS ON COMPULSORY ACQUISITION OF LAND—POWERS, PROCEDURE AND COMPENSATION. Ninth Edition. By ANTHONY CRIPPS, M.A., of the Middle Temple, Barrister-at-Law, assisted by B. KEITH-LUCAS, M.A., Senior Lecturer in Local Government in the University of Oxford, Solicitor, and S. LLOYD JONES, LL.M., Chief Assistant Solicitor, Nottingham Corporation. [London : Stevens & Sons, Ltd. Vol. 1 and Replacement Supplements Vol. 2. 1859 and (index) 17 pp. £8 11s. 6d. net.]

IN 1881 the late Lord Parmoor, then C. A. Cripps, Barrister-at-Law, compiled a textbook on Compensation which was concerned with the Compulsory Acquisition of Land. It did not take long to establish itself as a work of the greatest practical utility and was characterised by its comprehensiveness as well as soundness of law. A second edition was called for in 1884 and until the fifth edition in 1905 it enjoyed the re-editorship of its learned author. Since that date further editions have been called for and now the ninth is presented in a new format on the loose-leaf principle to enable the work to be kept cumulatively up to date having regard to the enormous increase in supplementary subordinate legislation in the form of what are now known as statutory instruments, and the title has become standardised as 'Compulsory Acquisition of Land', 'Cripps on Compensation' in a modernised dress. The plan of the work has been adapted to meet current requirements. Part I is concerned with Powers to acquire land, Part II Procedure for acquiring, Part III Compensation when land duly acquired or affected, and a Miscellaneous section entitled New Matters with Appendices, the latter comprising statutes, statutory instruments, precedents, cases on disturbance and re-instatement, and ministerial directions. Each of the parts is preceded by an informative Introduction. The whole work is introduced by a Foreword by Sir Stafford Cripps who with a *pietas* refreshingly present, as unhappily so often lacking, in the new issues of old textbooks, observes that he trusts that this volume edited as it is by a grandson of the original author, will be found as useful a work of reference as were the preceding editions. A perusal of this monumental publication leaves no doubt on this score. The editor-in-chief in his Preface aptly observes that the statutory 'evolution of the law has necessitated a complete overhaul and rearrangement of the contents as well as a change of title . . . in order to present "the living law" a new type of loose-leaf service has been evolved whereby changes in the law and practice are incorporated immediately in their proper place in the work. This is no mere supplementary service. New sheets will be sent to the subscriber at frequent intervals and will replace the existing pages. In the new binder, introduced for the first time, any page can be placed instantly'. The labour involved in the production of a book of this kind must have been prodigious and the user of the work can be assured that there is available to him all the resources necessary to grapple with the complicated *corpus juris* which modern developments in this ramifying sphere of the law call forth. It must not, however, be thought that the work would be of use solely to those concerned with Compulsory Acquisition. It is a quarry from which much information in many outlying areas of the law can be dug, although primarily and for the most part the book steers an even course along the roadstead which leads on the one hand to Compulsory Acquisition and on the other to Compensation. One reflection that is prompted by the present edition is that the social legislation of the present day is gradually altering the method of the presentation of practical law, and the mechanisation of the law finds its counterpart in the mechanisation of format introduced for the greater convenience of practitioners. A '*laudator temporis acti*' cannot but ponder with the affection which the legal bibliophile possesses for the book of old, which in the more literal sense was to be read rather than to be 'used'.

This, however, is no aspersion upon the present edition which has been designed to meet very obvious needs, and has met them with boldness and success.

BERTRAM B. BENAS.

THE LAW AND PRACTICE OF MEETINGS. Third Edition. By FRANK SHACKLETON, F.C.I.S. [Sweet & Maxwell, Ltd. 1951. xx and 364 pp. 35s.]

THERE is no 'branch' of the law dealing with meetings. That is what makes books of this kind so refreshing to those who usually study 'subjects'. The contents of the book are derived from miscellaneous sources, including judicial decisions on a wide variety of topics usually classed as contractual, constitutional or quasi-judicial, statutes such as Companies Acts and Local Government Acts, Parliamentary practice, traditional experience and common sense. The first edition appeared in 1934 and was out of print by 1939. The war delayed until 1947 the second edition, which was widened in scope and incorporated extracts from Parish's *Chairman's Pilot and Chart*. This third edition has been brought up to date by the inclusion of the provisions of the Companies Act, 1948, and the Companies (Winding-up) Rules, 1949, and by noting amendments to the Local Government Act, 1933.

All who are concerned with the organisation and management of meetings will find the book useful, whether they are directors or secretaries of chartered or statutory companies, local government officers or councillors, trade union officials, executives of professional or commercial associations, outdoor or indoor political agitators, or committee members of student societies. Persons responsible for the conduct of registered companies and local authorities will find themselves largely governed by statute; at least they must look to the governing statutes first. The large number of semi-skilled amateurs who run societies throughout the country, and for whom the book will be most valuable, will look first to the society's rules (if any). Where the rules are defective—as they always are—Mr. Shackleton will give them sound guidance, either as to the position where there is no rule governing the point or how to frame new rules so that their particular problem will not arise again. Although the Mother of Parliaments is the ancestress of so many rules of procedure—one influential line of descent being the Oxford and Cambridge Unions—we are warned against attempting to borrow rules of Parliamentary practice wholesale for meetings of our suburban tennis club. Embarrassing questions are liable to emerge suddenly, such as whether the chairman has a casting vote in addition to or instead of a substantive vote—a question which has perplexed Colonial Governors in their Legislative Assemblies. An interesting study may also be made of the concept of the quorum. Some statutory bodies have a quorum of three, some of two. There can hardly be a 'meeting' of less than two persons, and there is authority for saying that for a public meeting at common law there must be at least two persons besides the chairman, which gives us the three persons who may constitute an unlawful assembly. At any rate, the proceedings of the sole surviving member of the exclusive club in Max Beerbohm's *Zuleika Dobson* should not be taken as a precedent.

O. HOOD PHILLIPS.

NEGLIGENCE WITHOUT FAULT. By ALBERT A. EHRENZWEIG. [Berkeley and Los Angeles: University of California Press. 1951. 96 pp. $2.]

DESPITE its somewhat paradoxical title the main theme of this interesting little book is that there should be an extension of strict liability in tort on

the *entrepreneur* principle. A person should be liable for harm that he ought to foresee in a general way as likely to follow from his activity, even though the particular harm occurred without his fault. The rationale is that the harm is of a kind that the *entrepreneur* may be expected to have insured himself against. The author thinks that the present tendency in America (which is paralleled by English developments) is in favour of this theory, and that the development should be accentuated.

American cases are quoted to show that at present this result is even reached in the action of negligence itself. Juries, and even judges, are ready to find that a master is vicariously liable for the 'negligence' of his servant, when they would not be prepared to hold that the servant was negligent if the action were against the servant. The term 'negligence' is thus becoming fictitious, being merely a cloak for the application of strict liability to the master.

Perhaps this furnishes part of the answer to the puzzling question whether a master who is held vicariously liable should be able to recover indemnity from the negligent servant. On principle the argument would seem to be in favour of such recovery. Yet if the fact is that the judgment against the master would never have been rendered against the servant, such indemnity becomes unjust. If, therefore, there are in fact different standards of liability for masters and servants, it would perhaps be best to make this difference explicit. The master's liability could be treated in many cases as an original strict liability and not as derivative from the liability of the servant. The right of indemnity against the servant should then depend on proof of genuine negligence in the servant.

Yet it may be doubted whether the defects of strict liability do not outweigh the advantages. The author does not consider the difficulty of setting bounds to the enterprise principle, nor the administrative cost of a system of reparation dependent on private insurance and litigation. As a deterrent system or an expression of social ethics the law of tort is worth its keep; as a system of social insurance it is plainly defective, and would be even if Mr. Ehrenzweig had his way.

G. L. W.

An Introduction to Legal Reasoning. By E. H. Levi. [Chicago: University of Chicago Press. London: Cambridge University Press. 1950. 74 pp. 15s.]

For those who are interested in comparative law and what Professor Allen has called *Law in the Making*, Professor Levi's little monograph on legal reasoning will be most welcome. He points out that the legal process does not consist in applying known rules to diverse facts, but that 'a working legal system must be willing to pick out key similarities and to reason from them to the justice of applying a common classification'. He proceeds to illustrate how this process works in the United States in the field of judicial decision, statute and interpretation of the Constitution. In order to make the reasoning most clear he has taken as the subject of his study the problem of illegal immorality and explains how various manifestations of sexual conduct have been brought within the Mann Act and the 'Commerce' clause of the Constitution. His examination of the 'Commerce' clause shows that it is sometimes essential for the Supreme Court to disregard earlier interpretations of the Constitution. He explains this by pointing out that 'a change of mind from time to time is inevitable when there is a written Constitution, . . . (for) in its general provisions (it) embodies the conflicting ideals of the community', and the growth of the scope of a measure by legal reasoning is a 'reflection of a period in which increasing governmental control and responsibility for the individual were thought to be proper'. The veracity

of this statement may be seen in the recent decisions of the Supreme Court concerning the rights of Negroes and the non-enforcement of racial restrictive covenants, accompanied by a new interpretation of the concept of 'separate but equal'.

Unfortunately this little book is not to be recommended to students, for it would be asking too much to expect them to be satisfied with a statement like the following: 'The rule which will be created arises out of a process in which if different things are to be treated as similar, at least the differences have been urged. . . . The reasoning may take this form: A falls more appropriately in B than in C. It does so because A is more like D which is of B than it is like E which is of C. Since A is in B and B is in G (legal concept), then A is in G. But perhaps C is in G also. If so, then B is in a decisively different segment of G, because B is like H which is in G and has a different result than C'.

L. C. Green.

Current Legal Problems, 1949. Edited by George W. Keeton and Georg Schwarzenberger, on behalf of the Faculty of Laws, University College. [London: Stevens & Sons, Ltd. 1949. ix and 288 pp. 21s.]

Current Legal Problems, 1950. Edited by George W. Keeton and Georg Schwarzenberger, on behalf of the Faculty of Laws, University College. [London: Stevens & Sons, Ltd. 1950. vii and 305 pp. 21s.]

In 1946 the Faculty of Laws at University College, London, established a series of lectures dealing with topical legal problems of more than technical interest. It was decided to make the lectures available in a permanent form by publishing them as an annual series. To the first volume published in 1948 the learned editors, Professor Keeton and Dr. Schwarzenberger, have now added the volumes for 1949 and 1950, thereby putting us further in the debt of the University College Faculty of Laws, especially those of us who do not have the opportunity of attending the lectures. Short of setting out the Table of Contents of these volumes it is difficult to know how a reviewer can give an idea of the wide variety of stimulating matter which they contain, and we can only apologise to the learned authors of the excellent addresses which we have not space to mention.

In the 1949 volume Lord Porter raises the question whether, now that the treatment of criminals is being so much ameliorated, the procedural and evidential safeguards which were formerly essential for their protection do not work against the proper administration of justice. Professor Vesey-FitzGerald, on the basis of his experience of Indian law, argues in favour of the distinction between murder in the first degree (involving the death penalty) and murder in the second degree (involving imprisonment for life or less), and of allowing the judge in murder cases a discretion as to the sentence to be imposed. Goaded by the case of *Re Diplock* Professor Keeton speaks of 'the Charity Muddle', and asks for a periodic statement by the House of Lords of some of the general principles on which charity decisions are founded, and for power for the court—in cases where, as in *Re Diplock*, a technical slip is made—to direct the application of the fund exclusively for charitable purposes. Mr. Richard O'Sullivan, K.C., contends, with the help of carefully selected extracts from the earlier sources, that the common law was brought up in the European Christian tradition, but something seems to have happened to the law of England since Sir Thomas More was beheaded. The practical approach of English civilians of the seventeenth and eighteenth

centuries is stressed by Professor Jolowicz, who thinks that the nineteenth-century historical school had a deadening effect on the study of Roman law in this country. Professor Wade deals with one of the most important constitutional problems of our time in discussing Parliamentary methods of supervising Public Corporations, a problem that has since been partially solved by Speakers' rulings and Ministerial pronouncements. Mr. R. C. FitzGerald paints the sunset over the British Empire, and folds up his easel in the twilight of Dominion status.

Among the lectures in the 1950 volume is an important contribution by Professor Keeton on the Changing Conception of Trusteeship, a change due partly to the growing practice of employing corporate trustees instead of unwilling amateurs, and partly to the rise in administration costs and the dwindling of trustee investments. The changed relation of landlord and tenant is lucidly presented by Mr. Dennis Lloyd; and Mr. D. C. Holland makes constructive proposals on the still topical subject of Courts-Martial.

With the 1949 volume *Current Legal Problems* becomes the organ of the Bentham Club, a recently founded society of the graduates of the Faculty of Laws of University College, London; and we cannot conclude this review without mentioning the Address of their first President, Lord du Parcq, who died two months after delivering it. His lecture on 'The Final Court of Appeal' has the grace and charm that characterised all his utterances. Among the interesting sidelights which it throws on the House of Lords are an account of the setting up of the Appellate Committee in 1948, and a discussion of the presence of lay peers, which incidentally seems to imply that the decision of *Rylands* v. *Fletcher* was unconstitutional and void as only two qualified peers were present. Lord Normand in the 1950 volume gives an equally authoritative account of the variegated work of the Judicial Committee of the Privy Council.

O. Hood Phillips.

The Death Duties. Eleventh Edition. By Robert Dymond, Solicitor, and formerly Deputy Controller of the Estate Duty Office, and Reginald K. Johns, ll.b., of the Estate Duty Office. [London: Solicitors' Law Stationery Society, Ltd. 1951. lxxxvii and 801 pp. (index 53 pp.). 75s. net.]

Since the last edition of this truly classic work in 1947, the law relating to the Death Duties has been revolutionised. For the Finance Act, 1949 (section 27), abolished the Legacy and Succession Duties, the former of which had been in existence from as long ago as 1796; this repeal applied in the case of all deaths or other 'events' occurring after July 30, 1949, with certain savings for 'arrears'.

The present edition, whose revision has almost entirely been undertaken by Mr. R. K. Johns who had assisted the original author in the last (10th edition), is therefore confined, in effect, to the Estate Duty. Opportunity has accordingly been taken not only to alter the lay-out of the work but also very considerably to expand that part of the text relating to the Estate Duty. This has been found possible by excluding all reference to the obsolete Legacy and Succession Duties save for a brief summary in Chapter 2; the account of these duties in the previous edition occupied no fewer than 140 pages compared with twenty-five in the current edition.

The field covered by the Estate Duty is so extensive and the subject-matter so technical and involved that a detailed analysis of the work would be out of place in these pages. Accordingly attention will be devoted to the more important changes made since the last edition.

A very valuable new section (Chapter 1) has been added dealing with 'The Interpretation and Construction of Taxing Acts', for which the learned

editors have drawn largely upon cases decided under the Income Tax Acts, *e.g., I. R. C.* v. *Duke of Westminster* [1936] A.C. 1, as to 'The Substance of a Transaction'. Chapter 12 which deals with 'Transfers to Companies' has been nearly doubled in content; this has allowed space for many arithmetical examples illustrating the practical effect of the legal problems involved. With this may be linked up a much enlarged section—Chapter 14 (B) -dealing with the basis of valuation of shares in Limited Companies, with special reference to the principles on which the value of shares, particularly in restricted markets and in private companies, should be estimated.

Considerable changes in the law relating to inter vivos gifts were made by section 46, Finance Act, 1950; the whole subject is now dealt with in a much enlarged Chapter 9. In the previous editions 'Property Outside Great Britain' was rather briefly considered in a subsection of less than twenty pages as part of the opening chapter. In the current edition this topic has been admirably dealt with in the first half of an entirely new section—Part V, 'The Foreign Element'—running to some fifty pages. The second half of this Part is devoted to 'Double Taxation Relief' and contains a very useful Annotation of the Double Taxation Conventions made with the U.S.A., Canada, Union of South Africa and the Netherlands; the text of these Conventions is set out verbatim at the end of Appendix 1. A most useful innovation is to be found in Appendix 2 which contains a narrative account of the corresponding Death Duty provisions in the statutes of the three first-mentioned countries.

As may be expected from their connection with the Inland Revenue Department, though the editors make it clear that the work has no official authority, schemes for the evasion of the Estate Duty find no place in it. As they observe, such schemes, quite apart from the ethics of the matter, are of a highly speculative value in practice. They are, it is pointed out, often costly and often provoke expensive litigation, while they may result in unforeseen and embarrassing consequences and, finally, they are always liable to be frustrated by subsequent legislation. Recommendations are, however, made for certain improvements in the law relating to the Estate Duty. It is suggested that a general consolidation of the statutory provisions relating to this duty—to be found in some forty-three Acts of Parliament—is long overdue. The rates of duty upon agricultural property call for amelioration, while part of the burden of the Estate Duty should be shifted on to legatees now that the Legacy and Succession Duties have been abolished.

The general set-up of this edition is back to pre-war standards, if it is not indeed better; paper and binding are almost on luxury lines, while the type is a pleasure to read. The Table of Cases and the Index are fully adequate, while both statute and case law is noted up to mid-December, 1950.

To conclude, Mr. R. K. Johns is to be congratulated upon the really excellent way in which he has executed the considerable editorial work involved. This valuable book has thereby been made even more indispensable to all those concerned in any way with the administration of estates.

A. Farnsworth.

Buying and Selling a House. By M. Basil Evans, M.B.E., F.R.I.C.S., F.A.I., M.INST.R.A. 'This is the Law' Series. [London : Stevens & Sons, Ltd. 1950. viii and 155 and (index) 7 pp. 6s. 6d. net.]

One of the most valuable features of the 'This is the Law' series is that the subjects tend to be selected according to the needs of the layman rather than the classifications of lawyers. Mr. Evans' lucid book is an excellent example of this, for he dips into subjects such as vendor and purchaser, landlord and tenant, rent restriction, solicitors' remuneration and the like,

and presents the reader with an eclectic statement of what he needs. Indeed, the book is particularly valuable in that, belying the title of the series, much of it is drawn from the experience of estate agents, valuers and architects, rather than that of the legal profession; it contains a wealth of practical advice of this nature which should especially commend the book to lawyers. The work has been very well done.

R. E. M.

A Guide to the Microfilm Collection of Early State Records. [Library of Congress. 1950. $5.00.]

The enormous task of microfilming the early State records has been accomplished, and this volume of about 800 pp. is a list of the resulting 1,700 reels of film. From the Legislatures we have journals, debates and papers, and statutes both compiled or codified, and in the form of session laws. There are the early charters and constitutions and the proceedings of constitutional conventions, administrative records (largely reports of public officers on the business done by them), executive records of the governors' activities, and the earliest judicial records. The filming extends from the earliest extant records of each class down to the date at which they are reasonably accessible in the larger libraries in print; in practice this means about 1860–70, but in some cases the series continues into the twentieth century, especially for the youngest States. This is a splendid achievement which will be of the utmost utility to all students of American law and government.

T. F. T. Plucknett.

Cases on Constitutional Law. Fourth Edition. By Noel T. Dowling, Harlan Fiske Stone Professor of Constitutional Law, Columbia University. [Brooklyn: The Foundation Press, Inc. 1950. xxxv and 1273 pp. $8.50.]

Of all subjects in English law courses constitutional law is perhaps the least suited to the casebook method of study. In the United States it is hardly possible to study constitutional law by any other method. The Constitution means what the Supreme Court at any given time says it means. Unlike the federal constitutions of Canada and Australia, the United States Constitution is not a statute, and the measure of certainty infused into the judicial analysis of those constitutions by the application of ordinary rules of statutory interpretation is lacking. Nor are such concepts as the police power, the commerce power, immunity of instrumentalities, equal protection of the laws, due process of law, susceptible to exact definition. In this context the political philosophies of individual judges become all-important; the doctrines of the American realist school of jurisprudence become less implausible when considered in relation to the interpretation of the American Constitution.

That the present volume has run into four editions in only thirteen years is sufficient testimony to its popularity in American law schools. It follows the familiar pattern of the University Casebook Series: division into chapters, long extracts from leading decisions, shorter notes on other cases and citations of all relevant law review notes and articles. Editorial comment is somewhat brief, however, and English students will probably prefer to approach American constitutional law through the books of Amos, Corwin, Wright and Swisher, and the less daunting casebooks of Fairman and Cushman.

Two features of the present volume are especially interesting. The first is a long new Introduction, by Mr. John M. Kernochan, on the origin of the

doctrine of judicial review. The Constitution nowhere empowers the Judiciary to hold statutes to be unconstitutional; the doctrine of judicial review was laid down by Marshall C.J. in the great case of *Marbury* v. *Madison* in 1803. Mr. Kernochan argues that this was no arbitrary assumption of authority by the Judiciary, but was the culmination of a long process of development. The fathers of confederation certainly contemplated its possibility, and among the most important historical sources of the doctrine were the review of colonial legislation exercised by the Privy Council and colonial courts and the attribution by Coke, in *Dr. Bonham's Case,* of fundamental law characteristics to the common law. Secondly, there is an Appendix showing the political allegiances of all Justices of the Supreme Court on their appointment by the various Presidents. Until recent years nothing was rarer than the appointment of a Democratic Justice by a Republican President, except the appointment of a Republican Justice by a Democratic President.

S. A. de Smith.

Spörsmal Angaende Rembours. By Ake Lögberg. [Uppsala: Almqvist and Wiksells Bokdryckeri AB. 1950. 116 pp. and (appendices) 36 pp.]

This short treatise on the law of documentary credits is of much interest, particularly to students of comparative law. It contains a reasonably extensive summary of the Swedish text in English, and with the assistance of this English readers will find the book well worth while.

The author is mainly concerned with Swedish law, and some of the decisions of Swedish courts to which he refers may prove useful to English lawyers. He makes it clear, however, that the development of this branch of finance, with consequent legal growth, is largely English in origin with the U.S.A. following hard at our heels. Two points of interest may be noticed. First that the revocable credit seems to be still extensively used on the Continent. Second that Scandinavian law does not seem to have been able to find any method of giving legal effect to the important machinery of the trust receipt.

C.

Books and Publications received :—

An Outline of the Law of Landlord and Tenant. By A. M. Wilshere, m.a., ll.b. Third Edition by V. G. Wellings, m.a. [Sweet & Maxwell, Ltd. xiv and 114 pp. 10s. net.]

Trade Marks and the Law of Unfair Competition. By T. A. Blanco White. Second Edition. [Stevens & Sons, Ltd., 'This is the Law'. xii and 74 pp. 5s. net.]

Food and Drugs Administration. Supplement to First Edition. By Stewart Swift, m.b.e. [Butterworth & Co., Ltd. xi and 252 pp. Main Work and Supplement, 50s. Supplement alone, 15s. By post 4d. extra.]

English Legal History in a Nutshell. By Joseph Jackson, m.a., ll.m. [Sweet & Maxwell, Ltd. viii and 103 pp. 6s. 6d. net.]

Vol. 14. No. 1 JANUARY 1951

THE MODERN LAW REVIEW

CONSENT OF THE PARTIES TO THEIR MARRIAGE By Joseph Jackson 1

TAKING AND THE ACQUISITION OF POSSESSION IN LARCENY By P. B. Carter 27

SUGGESTED REFORM OF THE LAW RELATING TO CHEQUES By J. Milnes Holden 33

THE ROYAL MARRIAGES ACT, 1772 By C. d'O. Farran 53

NOTES OF CASES 64

Republic of Italy v. Hambros Bank 64
Re Hone 65
R. v. S. Greenhoe JJ. 67
Nakkuda Ali v. Jayaratne 71
Earl FitzWilliam's Wentworth Estates Co. v. Min. of Town and Country Planning 73
F. E. Jackson & Co. v. Price Tribunal 76
Kenward v. Kenward 77
Best v. Samuel Fox & Co. 84
Lissack v. Lissack 86
Buttle v. Saunders 88
The Hallinan Case 89

REVIEWS 94

Vanderbilt (ed.): Minimum Standards of Judicial Administration 94
Schwartz: American Administrative Law 95
Cahn: The Sense of Injustice 97
Hall: Living Law of Democratic Society 99
Holtzoff (ed.): Federal Rules of Criminal Procedure 100
Wendell: Relations between Federal and State Courts 101
Goldschmidt: Sistema y Filosofia del Derecho Internacional Privado 102
Munkman: Law of Quasi-Contracts 103
Bullen & Leake's Precedents of Pleadings (10th ed.) 104
Phipson's Manual of the Law of Evidence (7th ed.) 105
Underhill's Law of Torts 106
Williams: Learning the Law (3rd ed.) 106
Teece & Harrison: Law and Conduct of the Legal Profession in N.S.W. 107
Laslett (ed.): Filmer's Patriarcha 108
Beiträge zum Zivilprozessrecht 109
Trial of German Major War Criminals 109
History of the U.N. War Crimes Commission 111
Riese: Luftrecht 112
Schweizerisches Jahrbuch für Internationales Recht 112
Thomas More Soc.: Under God and the Law 114
H.M.S.O. Publications on International Law 114
Mathew: Office and Duties of the Director of Public Prosecutions 116
Pollock's Principles of Contract (13th ed.) 118
Evershed: The Court of Appeal in England 118
Etc.

January 1951, 7s. 6d. *Subscription for 1951, 25s. post free*

PUBLISHED FOR THE MODERN LAW REVIEW LTD. BY

STEVENS & SONS LIMITED

119 & 120 CHANCERY LANE, LONDON W.C.2

Canada & U.S.A.: THE CARSWELL COMPANY LTD., Toronto, Canada

THE JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW

THIRD SERIES Vol. XXXII Parts III and IV 1950

CONTENTS

THE LATE MR. C. E. A. BEDWELL

THE DINNER OF THE SOCIETY

THE CENTRAL LEGAL OFFICE FOR THE BRITISH ZONE OF GERMANY
Contributed by H. P. Romberg, Esq.

FOREIGN ELEMENTS IN ANCIENT ISLAMIC LAW *Contributed by Joseph Schacht, Esq.*

THE CASE OF BANK NATIONALISATION *Contributed by Professor Geoffrey Sawer*

LAW AND JUDICIAL PRACTICE IN ISRAEL *Contributed by Dr. J. Sussmann*

THE TEACHING OF COMPARATIVE LAW IN THE U.S.A.
Contributed by Professor R. H. Graveson

THE PUBLIC LAW OF OVERSEAS FRANCE SINCE THE WAR
Contributed by K. E. Robinson, Esq.

ISLAMIC LAW AND CUSTOMARY LAW IN FRENCH NORTH AFRICA
Contributed by Professor G. H. Bousquet

PENAL CLAUSES IN CONTRACTS: A COMPARATIVE STUDY
Contributed by Norman S. Marsh, Esq.

NOTES ON CONSTITUTIONAL DEVELOPMENTS IN THE COMMONWEALTH

NOTES NOTICES OF BOOKS

Price: Ten Shillings

THE SOCIETY OF COMPARATIVE LEGISLATION

18 NORTHUMBERLAND AVENUE, LONDON, W.C.2

THE BRITISH JOURNAL OF

DELINQUENCY

Editors

EDWARD GLOVER · HERMANN MANNHEIM · EMANUEL MILLER

Volume I Number 2, (October, 1950) now available, includes the following papers :—

N. MULLER. *The Group Factor in Crime and Punishment.*

JOHN C. SPENCER. *The Unclubbable Adolescent.*

EDWARD GLOVER. *On the desirability of Isolating a 'Functional' (Psychosomatic) Group of Delinquency Disorders.*

ALAN MABERLY. *Delinquency in Handicapped Children.*

OTTO L. SHAW. *The 1946 Law in Paris.*

Notes on Current Research.

Reviews, Abstracts, etc.

Annual Subscription 27s. 6d. (U.S.A. $4.25) *separate issues* 7s. 6d. *Postage* 2d.

Published by

THE INSTITUTE FOR THE STUDY AND TREATMENT OF DELINQUENCY

and BAILLIÈRE, TINDALL AND COX

NOW READY

In Two Volumes *£10 12s. 6d. net, post free*

RUSSELL on CRIME

Tenth Edition

By J. W. CECIL TURNER,

M.C., M.A., LL.B., *Barrister-at-Law*

Russell on Crime is the classic exposition of the criminal law and in this new edition will be found to have regained its force and clarity.

The many cases which are cited have been subjected to a critical examination to determine the factors which have contributed to the development of our criminal law. As a result a great part of the work has been rewritten and the true legal principles have been freed from the accumulated detail of decided cases which obscured them.

Thus revised and brought up to date it will be more than ever indispensable to those who are interested whether professionally or academically in criminal law.

A STEVENS PUBLICATION

SWEET & MAXWELL, LIMITED

2 & 3 CHANCERY LANE, LONDON, W.C.2

No. 3 . . . The Library of World Affairs

A Manual of International Law

By GEORG SCHWARZENBERGER

'The non-professional reader may well find in this comparatively short book a more practical guide to the subject than that to be culled with pain from many more elaborate volumes and from all the cast gospels abroad to-day for the worlds redemption. The author has placed lecturers in the subject under the greatest obligations; and whatever their views in a very "viewy" subject, they have available a *Manual* which ought to form an admirable basis for discussions of specific and defined issues. The facilities for reference are excellent.'

—*University of Toronto Law Journal.*

Published under the auspices of THE LONDON INSTITUTE OF WORLD AFFAIRS

25s. net. A STEVENS Publication *Postage 1s.*

SWEET & MAXWELL, LTD., 2 & 3 CHANCERY LANE, LONDON, W.C.2

CATALOGUES

Law Books of the British Commonwealth of Nations

1950. 8s. post free.

A Supplement to Sweet & Maxwell's Legal Bibliography

Contains :

All English and International Law Books since 1925.
Irish Books since 1935.
Scots and Roman Law Books since 1936.
Australasian Books since 1937.
Rest of the Commonwealth since 1938.

FREE

Catalogue A. Complete List of all Sweet & Maxwell's Publications.
Catalogue Q. Full Catalogue of Students' Law Books.
Catalogue R. Secondhand Books—Legal Biography, Inns of Court, Trials, Speeches, etc.

SWEET & MAXWELL, LTD., 3 CHANCERY LANE, LONDON, W.C.2

Printed in Great Britain by The Eastern Press, Ltd., London and Reading.

UNIVERSITY OF LONDON